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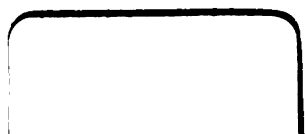
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# AMERICAN JURIST

AND

## LAW MAGAZINE

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*James S. Warren*

## AMERICAN JURIST.

NO. LI.

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OCTOBER, 1841.

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### ART. I.—LIFE OF LORD CAMDEN.

[From the *Law Magazine*, vol. ix. p. 34.]

THE possession of the highest offices in the law has so unfrequently been found united in the same individual with a declared opposition to the encroachments of prerogative, and a zealous assertion of popular privileges, that it is matter of surprise that the biography of lord Camden, in whom this union was most conspicuous, and who was in consequence, during a great part of his political life, the object of unbounded national applause and reverence, instead of being fully written by some of his contemporaries qualified for the task by intimate personal knowledge, should never even have been detached, except in the most meagre and imperfect manner, from the general history of English politics, and the bulk of contemporary memoirs.

The name of lord Camden was mentioned in a former volume<sup>1</sup> as one in the catalogue of lawyers by descent. His father, sir John Pratt, descended from a family of some antiquity and consideration, which had been settled since

<sup>1</sup> See *Life of Lord Hardwicke*, *Am. Jur.* vol. xxv. p. 47.

the reign of Elizabeth at Careswell Priory, near Collumpton, in Devonshire, was called to the bar about the year 1684, and practised with much reputation during the three following reigns, and represented the borough of Midhurst in two parliaments, until, on the accession of George I., he was appointed a judge of the king's bench; and in Easter term 1718, on the elevation of lord Parker to the chancellorship, was raised to the dignity of chief justice of the same court, in which he presided until his death in February 1724. Many a young sessions subaltern, who might otherwise have remained unconscious of the existence and dignities of sir John Pratt, has been made familiar with his name from the well-known doggerel version of a settlement case, preserved by Burrow and transplanted into Burn's Justice, wherein his lordship as Coryphæus, and the puisne judges as the chorus, are made to chaunt forth the judgment of the court, touching the case of the woman, who,

——— "having a settlement,  
Married a man with none."

Sir John had by each of two marriages a family of four sons and four daughters. Charles, the subject of this memoir, the third son by his second wife, (daughter of Hugh Wilson, a Montgomeryshire clergyman and canon of Bangor,) was born about the close of 1713 or the beginning of 1714. Of his boyhood and early youth we can find little recorded, beyond the general statement, that he was already distinguished as a lad of much promise, and reasonably diligent and studious, possessing at the same time a flow of animal spirits, and a cheerful and affectionate temper, which made him a great favorite amongst his companions. He was sent early as a *colleger* to Eton, and had for his contemporaries there, amongst others, the elder Pitt, Lyttelton, and Horace Walpole; the two former, however, a few years his seniors. It is most probable that he laid there the foun-

dation of that friendship with the first of them, which lasted unbroken and undiminished till his death, and which in their mature years was drawn into so close a political as well as personal attachment. That young Pratt did not misemploy his time at school is manifest from the circumstance of his obtaining the election to King's College, Cambridge, where he entered into residence in the October term, 1731. The scholars of King's, as many of our readers are aware, being entitled to their degree without the necessity of appearing in the university schools, or passing the ordeal of a senate-house examination, it was not necessary for him to employ the period of his undergraduateship in the prosecution of the ordinary academical studies, and he was left at liberty to apply himself to others more congenial with his taste, and, as it proved, more subsidiary to his success and reputation in the world. Destined from the first for the legal profession, (for he had been entered of the Inner Temple at the age of fifteen,) it appears, accordingly, that his favorite reading (of a serious kind) was directed, while at college, to the history and constitutional law of England; and he exhibited already that predilection towards the popular principle in the constitution, by which his public life was so uniformly marked. In all the contests in which his college was engaged, whether for the election of its own officers, or the establishment of its exclusive privileges, Pratt was found espousing the *popular* side, and opposing himself to "unstatutable influence" with as much warmth and tenacity, as he afterwards was wont to display on the wider arena of national dispute. He became as of right, at the end of three years from his election, a fellow of his college, and proceeded in due course to his bachelor's degree in 1735-6, and to his master's in 1739; having in the interval, in Trinity term, 1738, been called to the bar. He practised, or rather waited for practice, some years at the common law bar, and travelled the western circuit, without

obtaining that reasonable share of business which his own talents, application, and professional acquirements, aided by the influence derived from his father's name and reputation, and his family connections in the west of England, might have been expected to secure to him, without undergoing that melancholy period of long probation, which many an aspiring youth has fondly anticipated would have been sufficient to clothe him in the honors of silk, if not to open a near prospect of the dignities of ermine — instead of leaving him with the sad adjuncts of a bag as empty, and a pocket emptier, than it took him up. For eight or nine long years did Pratt travel the same dull and almost hopeless round, until, if tradition speak truth, he was at last introduced to business by one of those lucky incidents, which have been attributed to more than one lawyer of eminence dead and living. The story bears, that he was at length so dispirited by his continued ill success, as to entertain serious thoughts of relinquishing his profession, returning to the seclusion of his college, and qualifying himself for orders; so that with the proceeds of his fellowship to eke out for the present the scanty portion of a fifth son, (if aught yet remained of it,<sup>1</sup>) and, with the certainty of succession to a college living in the course of a few years, he might be able to assure himself of an honorable though limited independence. With this melancholy prospect, he went to make one final experiment on his circuit, and then, if fortune were still unpropitious, to give up the pursuit. He communicated his determination to his friend Henley, afterwards lord chancellor Northington, who was some years his

<sup>1</sup> Pratt himself, in a familiar letter of the date of 1741, (the third year only of his probation,) bears witness to his state of *impecuniosity* :—"Alas, my horse is lamer than ever; no sooner cured of one shoulder than the other began to halt. My losses in horseflesh ruin me, and keep me so poor, that I have scarce money enough to bear me out in a summer's ramble; yet ramble I must, if I starve to pay for it."

senior, and also went the western circuit. Henley combated his purpose, first with raillery, and then with serious expostulation; but finding both insufficient to beat him out of it, managed to get him engaged as his own junior in a cause of some importance; and being, or contriving more probably to absent himself on the plea of being, taken ill, it fell to Pratt to hold the leading brief; and he acquitted himself so well, and displayed at once so much professional knowledge and ready power of elocution, as to ensure the verdict for his client, and to acquire among the dispensers of business, as well as among his brethren at the bar, the reputation of a sound lawyer and eloquent advocate. The ice was now broken, and we see him henceforward swimming stoutly with the stream. Circuit business first flowed in upon him: his friend Henley, we are told, continued his good offices; we find his name occurring here and there in the reports of the period,<sup>1</sup> until, in the course of some five or six years, he came, more particularly in cases wherein general principles or constitutional rights were involved, into extensive and profitable employment. In 1752 we find him second counsel in defence of Owen the bookseller, who was the subject of a government prosecution for publishing a pamphlet in vindication of Alexander Murray, the proceedings against whom by the house of commons for sedition attracted for some time so much attention: and on that occasion he strenuously maintained, in his address to the jury, the doctrine which he afterwards asserted with such energy in parliament, of their right to return a general verdict, and to pronounce upon the intention of the accused, as well as upon the fact of publication and the correctness of the innuendos. Some years afterwards, when in his char-

<sup>1</sup> The first printed case in which we have found his name appearing is a settlement case in Michaelmas term 1750; but the names of counsel were at that time of day given and omitted very irregularly.

acter of attorney-general he conducted the prosecution against the jacobite pamphleteer, Dr. Shebbeare, (the first libel case tried before lord Mansfield,) he equally assumed the same right in the jury, and accordingly, as he tells us himself, turned his back upon the judge while opening the case and commenting on the alleged libel, so as to intimate that in his view the whole question was one which the jury had the sole cognizance of, and the bench no part in. In Owen's case the jury adopted his view of the matter, and found an unqualified verdict of "not guilty," to which they adhered in spite of the inquiry which the chief justice (Lee), at the attorney-general's suggestion, addressed to them, whether or not they were satisfied with the evidence of publication. We see him also engaged in several other important crown cases within the two or three following years, and learn that he obtained besides considerable practice and reputation at the bar of the house of commons; and it appears to have been, thus far at least, principally as an advocate well read in constitutional law, and known as a liberal interpreter of it, that he established himself in general estimation. He does not appear at all in the courts of equity until after his appointment as attorney-general; and in the minor matters of daily discussion in the king's bench, his name occurs less frequently than that of many others. But he was about to be busied upon a wider and more important scene.

The duke of Newcastle's administration began early in the year 1756 to exhibit unequivocal symptoms of disorganization, and promised speedily to fall asunder before the combined assault of the two parties of Rockingham and Pitt. The timid and irresolute spirit of the minister crouched before the fulminations of his great opponent, and sunk within him at the gathering difficulties which the disasters of the war abroad, and increasing discontents at home, brought round him. In November of that year the dis-

jointed cabinet, notwithstanding all its attempts to patch it up, fell irretrievably to pieces. The series of negotiations and intrigues which occupied the next half year are well known to all readers of the memoirs of the time. They ended at last, in June 1757, in the restoration of the duke to the nominal head of the government, Pitt being, as secretary of state, its presiding spirit; and the post of attorney-general becoming vacant by sir Robert Henley's acceptance of the great seal, Pitt insisted, as a personal favor to himself, on its being filled by Pratt, his early friend, and in whose coincidence of opinion on political subjects he could place full confidence. He was accordingly installed in it, over the head and to the great chagrin of Charles Yorke, who had been some time solicitor-general, and who, years afterwards, in Pitt's second administration, endeavored to revenge himself by privately plotting with Charles Townshend, then chancellor of the exchequer, the undermining of the ministry of which they both were members, and the formation of a new one, in which Yorke himself should occupy the woolsack; an intrigue to which the young king George III. (already a worthy proficient in that science of dissimulation which has been pronounced by high authority a necessary qualification in a sovereign) was also a secret party, and which was rendered abortive only by Townshend's unexpected death.

A seat in parliament was obtained for the new attorney-general for the borough of Downton, which he continued to occupy as long as he remained a member of the house of commons. Almost the first parliamentary duty imposed upon him was one which conveyed a high compliment—that of preparing and conducting through the house the bill for explaining and extending the provisions of the habeas corpus act, the introduction of which arose out of a decision of the court of king's bench, that the statute of Charles II. did not apply to the case of a party impressed into the



king's service, unless he were charged with some criminal matter. In performing this office, "he declared himself," says Horace Walpole, "for the utmost latitude of the habeas corpus; and it reflected no small honor on him that the first advocate of the crown should appear as the firmest champion against prerogative." No distinct report of his speeches on this occasion is extant, the debates in the commons, as we have them in the parliamentary history, being all thrown into the form of a single argument on either side. The bill, as is well known, after encountering little opposition in that house, was rejected by the lords, "in compliment to lord Mansfield," according to Walpole; at all events, in deference to his and lord Hardwicke's authority and influence, and the undisguised hostility of the king: nor was it until more than half a century afterwards, and even then not without much opposition, that the legislature ventured on an extension of the act, absolutely necessary to give effect to its spirit and principles, and to which no argument could be opposed beyond the ordinary topics of prejudice and feebleness,—vague declamation about the dangers of innovation, and the absolute and unimprovable excellence of the system to be changed.

It was about this time that Pratt, already past forty years of age, found out that he had remained long enough a bachelor, and that for the full enjoyment of his brilliant prospects, it was expedient to share them with a partner. The lady of his choice was Elizabeth, daughter and co-heir of Nicholas Jefferys, Esq., of Brecknock Priory. Their first child, the late venerable marquis Camden, was born on the 11th of February 1759: another son, Robert, who entered the army and died abroad, and three daughters, were the other issue of the marriage.

It fell to Pratt to conduct, as attorney-general, the prosecutions against Dr. Hensey and Dr. Shebbeare for treason and sedition in 1758, and in 1760 that against the unfortu-

nate earl Ferrers: in all of which he demeaned himself after the honorable pattern of moderation and fairness set him by his predecessor Murray, and in a very different style from that in which state trials had been wont to be conducted. "As I never thought it my duty," he says in lord Ferrers's case, "to attempt at eloquence when a prisoner stood upon trial for his life, much less shall I think myself justified in doing it before your lordships; give me leave therefore to proceed to a narration of the facts." He now enjoyed, besides his official emoluments, an almost engrossing private practice in the courts of equity, to which (in the anticipation, it may be, which was eventually realized, of succeeding his friend lord Northington, when gout or party should drive him from the much coveted seat,) he had confined himself since he became attorney-general. We have had the curiosity to look through lord Northington's Reports, where the names of the counsel are almost uniformly given, and find, during the four years from 1757 to 1761, five cases only in which the attorney-general does not appear, in three of which five the counsel are not named at all. He had also received from the corporation of Bath the honor of being elected, in 1759, recorder of that city.

The accession of the new sovereign, the ascendancy of lord Bute, and the resignation of Pitt, wrought no depression of Pratt's fortunes. He continued to occupy his post of attorney-general until December 1761, when the death of Chief Justice Willes created a vacancy on the bench of the common pleas, which the government had no difficulty in offering at once for his occupation; and, in the present aspect of politics, he had as little hesitation in accepting a lucrative and now permanent dignity; and accordingly, having been first called to the degree of the coif, and knighted, he took his seat as chief justice on the 13th of January following; justices Clive, Bathurst, and Noel, being his

colleagues on the bench. A few weeks afterwards, he writes to his old friend Dr. Davies — "I remember you prophesied formerly that I should be a chief justice, or perhaps something higher. Half is come to pass: I am thane of Cawdor; but the greater is behind; and if that fails me, you are still a false prophet. Joking aside, I am retired out of this bustling world to a place of sufficient profit, ease, and dignity; and believe that I am a much happier man than the highest post in the law could have made me." So men persuade themselves. His friend lived, however, to congratulate him on his elevation to that *highest* post, and might have exclaimed to him in turn — "Thou hast it now, King, Cawdor, Glamis, all."

Very few days elapsed before the new chief justice gave a sufficient indication of the principles on which he intended to administer justice. In one of the first cases that came before him, a question arising as to the discretionary power of the court to receive or reject a plea *puis darrein continuance*, he took occasion to say, that "such discretion was contrary to the genius of the common law of England, and would be more fit for an eastern monarchy than for this land of liberty; *nulli negabimus justiciam, nulli deferemus*," &c. Nor was it very long before it appeared that he was not, in his judicial capacity, to be exempt from the discussion of questions of political right of the deepest concern to the liberty of the subject. In the spring of 1763, the memorable proceedings against Wilkes and his obnoxious North Briton, prosecuted by means of general warrants from the secretary of state, gave birth to numerous actions at his own suit and that of the persons employed by him (there were some fifteen or sixteen in all), against the secretaries, lords Halifax and Egremont, Mr. Wood, their under-secretary, and the officers engaged in the execution of the warrant. All these were brought in the common pleas; the known principles of the chief justice affording a

sufficient guaranty that, at all events, the objects of court vengeance would not meet with less countenance than the ministers of it. Before, however, any of them were ripe for trial, arose the question as to Wilkes's own right to be discharged from imprisonment. It was rested on three grounds; the incapacity of the secretary of state to issue a warrant of commitment at all; the want of particular statements in the warrant as to the nature of the libel; and lastly, the defendant's privilege of parliament. It was upon the last ground only, namely, that the publication of a libel was not, as a breach of the peace, such an act as deprived the libeller of his privilege, that the court, Wilkes being brought up by habeas corpus, directed his discharge;<sup>1</sup> nor did the judgment pronounced by the chief justice on that occasion in any degree declare, as was commonly alleged, the illegality of general warrants, which was not then brought into discussion. That question arose, however, speedily afterwards, in the action brought by Leach the bookseller against the messenger, Money, who, under the authority of the same warrant, had seized his papers and imprisoned his person. The chief justice having stated a decided opinion that the warrant was illegal, and the defendants not within the protection of the statute of the 24 G. 2, requiring notice of action to magistrates, a bill of exceptions was tendered on behalf of the defendant, which was not, however, argued before the court of king's bench until 1765, when the case laid the foundation of Dunning's fame, and elicited from the court a strong opinion against the validity of the warrant, although it ultimately went off on a bye point. In the same term with this (Michaelmas 1763,) was tried also

<sup>1</sup> Lord Kenyon intimated, in *R. v. Despard* (7 T. R. 742) that lawyers of eminence, who had considered the point since, were of opinion that lord Camden had on this point rather overstepped the line of the law; and said, that at all events the judgment was irreconcilable with many cases solemnly decided.

the case of *Wilkes v. Wood*, in which the chief justice gave way to all his constitutional warmth in denouncing the proceedings under the warrant: —

“The defendants claim a right, under precedents, to force persons’ houses, break open *escrutoires*, seize and detain their papers, upon a general warrant, where no inventory is made of the things thus taken away, and where no offenders’ names are specified in the warrant, and therefore a discretionary power given to messengers to search wherever their suspicions may happen to fall. If such a power is truly invested in a secretary of state, and he can delegate that power, it certainly may affect the person and property of every man in these kingdoms, and is totally subversive of the liberty of the subject. And as to the precedents, shall that be esteemed law in the secretary of state, which is not law in any other magistrate in the kingdom? If they should be found to be legal, they are certainly of the most dangerous consequences; and if not legal, must aggravate the damages. . . . Upon the maturest consideration, I am bold to say that this warrant is illegal: but I am far from wishing a matter of this consequence should rest solely upon my opinion; it may be referred to the twelve judges, and there is a still higher court before which it may be canvassed, and whose decision is final. If these superior jurisdictions shall declare my opinion erroneous, I submit, as will become me, and shall kiss the rod; but I must say, I shall always consider it a rod of iron for the chastisement of the people of Great Britain.”

These opinions he had not formed hastily. When, in the discussion in the house of commons upon the same question, in the February following, Mr. Pitt’s usage when in office to grant such warrants was quoted from the ministerial bench, he admitted that in the first instance in which he issued one (which was for the seizure of some persons on board a vessel sailing for France during the war), he had first consulted the attorney-general, who told him at once the warrant would be illegal, and if he issued it he

must take the consequences. On the present occasion, either the charge to the jury, or their impression that the chief object of ministerial attack was now seeking redress at their hands, produced a verdict for a considerably larger amount of damages — £1000, namely — than was given in any of the other cases. After it was returned, the defendant's counsel tendered a bill of exceptions, which the chief justice rejected as being too late. In several of the cases also motions were made for new trials on the ground of excessive damages, which the whole court agreed in refusing; considering the jury as the constitutional judges of the compensation due to the subject for the unlawful restraint on his person and outrage on his property. The court concurred also with the chief justice (and this is a matter on which more difference of opinion has existed, and which admits perhaps of more question) in considering the illegality of the proceedings, and their importance as affecting the rights of the subject generally, justifiable grounds for aggravating the damages in the particular case, which were not necessarily to be limited by the amount of actual imprisonment or injury sustained.

Another obnoxious publication — the “Monitor or British Freeholder” — was not long afterwards the object of prosecution, and the government were equally unlucky in the result of their proceedings. In one of the actions brought by the printer against the king's messengers (*Entick v. Carrington*) the question arose, and was solemnly debated on a special verdict, as to the power of the secretary of state to issue a warrant for the seizure of a party's papers, for the purpose of obtaining evidence to fix him as the publisher of a seditious libel. The chief justice, after the court had taken a considerable time for deliberation, delivered a most elaborate and masterly judgment, in which the several points that had been raised in argument were discussed in order, and the authorities and legal principles applying to each of

them, it may be affirmed, as nearly as possible exhausted. They were, first, whether the secretary of state, as such, or as a privy councillor, was invested with the character of a conservator of the peace, and the power of issuing a warrant against a party charged with a state offence; secondly, whether, if he were such a conservator, he was within the equity of the statute of the 24 Geo. II.; thirdly, whether the defendants had in fact duly pursued their authority; and lastly — by much the most important of all — whether the warrant was in its nature legal. On all the points except the first the opinion of the court was expressed unequivocally in the negative. To the argument, that the legality of such warrants ought to be inferred from the long usage to grant them, and the absence of any recent instance in which they had been questioned, the chief justice gave its fit answer,— that *no* argument could be drawn from the submission of guilt and poverty to power and the terror of imprisonment; that it would be strange doctrine to assert all the people of this land were bound to acknowledge that to be universal law, which a few criminal booksellers had dreaded to dispute. This judgment was not long afterwards (22d April, 1766,) followed by a resolution of the house of commons declaring warrants for the seizure of papers in cases of libel illegal.<sup>1</sup>

The popular sentiments thus announced from the judgment seat, and the liberation and victory of Wilkes, the idol of the hour, lifted the lord chief justice Pratt into the full tide of national favor. Addresses of thanks flowed in upon him from every side: London, Dublin, Norwich, Exeter, Bath, voted him the freedom of their corporations; and his

<sup>1</sup> Lord Camden and Dunning were believed to be the joint authors of the celebrated "Letter concerning Libels, Warrants, Seizure of Papers, &c." printed a few years afterwards in Almon's Register, and for which a prosecution was commenced against him by lord North's government, but dropped.

picture, painted by Reynolds, was solicited to adorn the Guildhall of the metropolis, with a Latin inscription "in honor of the zealous assertor of English liberty by law." So popular did his name become, that he was at this period, as we find from a letter of Horace Walpole to lord Hertford, one of the *lions* that a foreigner visiting London went to see. More permanent honors from the gift of the crown were soon to follow, and which might less reasonably have been looked for than demonstrations of favor from the people. One of the first and most popular acts of the short-lived Rockingham administration, on its accession to power in July 1765, was to advance him to the peerage, by the title of baron Camden, of Camden Place in the county of Kent; a property which had once belonged to the celebrated antiquary of that name, and had passed, after several changes of ownership, into the possession of the Pratts. But he did not therefore yield an indiscriminating support to the measures of the government. On the contrary, the very first occasion of his speaking in the house of lords (Feb. 10, 1766) was in vehement opposition to the resolution, which, as a condition precedent to the repeal of the stamp act, affirmed the right of Great Britain to make laws binding on the American colonies. He denied the favorite doctrine of the omnipotence of parliament; he denied that they could impose a tax upon the subject which he had not consented by his representatives to grant, with any more right than they could take away private property without making compensation, or condemn a man by bill of attainder without hearing him. He affirmed that in all past instances — in the case of the clergy, of the counties palatine, of Wales, of Ireland, — taxation had been accompanied, as its necessary adjunct, by representation. Disclaiming, as a consequence of his reasoning, the conclusion that America would be justified in claiming her independence, or resisting by rebellion the acts of the British legislature, although



made without authority, he insisted nevertheless on the exclusive right of the colonists in law to tax themselves. And, lastly, he urged forcibly on the attention of the government the wisdom and expediency of abstaining from the assertion of a right, which, even if well-founded, could not be exerted without exasperating America and endangering Great Britain. These doctrines, from which not many would now be found to withhold their assent at least in theory, were characterized from the woolsack as "new, unmaintainable, unconstitutional;" the chancellor declared that he had heard a paradox in every law he knew of; and in the other house of parliament they were visited with even stronger denunciations. A few weeks afterwards, on the introduction of the declaratory bill founded on the resolution of the two houses, lord Camden re-asserted still more strenuously his opinion, that taxation and representation were inseparable. "This position," he said, "is founded in the laws of nature; nay more, it is an eternal law of nature itself: for whatever is a man's own is absolutely his own; no man has a right to take it from him without his consent, expressed by himself or his representative; whoever attempts to do it attempts an injury; whoever does it commits a robbery; he throws down and destroys the distinction between liberty and slavery. I wish the maxim of Machiavel were followed, that of examining a constitution at stated periods, according to its first principles, this would correct abuses and supply defects: I wish the times would bear it, and that men's minds were cool enough to enter upon such a task, and that the representative authority of this kingdom were more equally settled. He ridiculed the idea that the house of commons began to exist at any definite æra: "It began with the constitution, it grew up with

<sup>1</sup> George Grenville, the author of the American Stamp Act, was very angry at this phrase, and declared that the house ought to take some notice of such language; but the house was something wiser than to meddle in the matter.

the constitution ; there is not," he continued, in words which have become familiar almost to every school-boy, but are nevertheless rather more rhetorical than true, — "there is not a blade of grass growing in the most obscure corner of this kingdom, which is not, which was not ever, represented since the constitution began ; there is not a blade of grass which, when taxed, was not taxed by the consent of the proprietor." We need hardly add that he found himself among the most strenuous supporters of the repeal of the stamp act.

The fall of lord Rockingham's ministry, — "that heterogeneous compound of youth and caducity," as it was termed by Chesterfield — in the following year, opened to the other section of the whig party the road to power and patronage. The great seal, left at Pitt's disposal by the resignation of lord Northington, he could have no hesitation in bestowing upon him, who, while he was his firmest political ally and among his most valued personal friends, had perhaps in other respects also the best title to the advancement. Lord Camden was accordingly, on the 30th of July, 1766, sworn into office as lord chancellor ; receiving by way of compensation for his removal from a permanent to a precarious dignity, the same terms which had been secured to his predecessor<sup>1</sup> — the reversion of a tellership of the exchequer for his son, with a salary of about £3500, and a pension of £1500 to himself, in case he should be dismissed from the chancellorship before the office in the exchequer became vacant. This arrangement, which certainly had at that time of day considerable excuse,<sup>2</sup> was afterwards made matter of reproach against lord Chatham by lord North's followers, and defended by him in terms of such indignant bitterness

<sup>1</sup> Lord Henley, by the way, denies that this bargain was made for lord Northington, but it is asserted by Walpole and lord Waldegrave.

<sup>2</sup> A retiring pension was not annexed to the office of chancellor until 1799. (39 Geo. III, c. 110.)

at his friend's dismissal, as to provoke a motion that his words should be taken down; a proceeding, however, from which his assailants, reminded by his haughty defiance with whom they had to deal, deemed it prudent quietly to recede.

During the four years of lord Camden's presidency in the common pleas, the business of the court, with the exception of the political trials we have spoken of, and a few other cases of some importance, was not of such a nature as to involve the discussion of general principles of jurisprudence, or to call forth much display of juridical learning, or of that argumentative eloquence for which he was distinguished. Of mercantile questions more especially, the court of king's bench, where they were adjudicated on by the great architect of our system of commercial law, had almost an entire monopoly. But all his contemporaries unite in bearing testimony to the combination of dignity, impartiality, and courtesy, with which he presided over the deliberations of his court. On no occasion was there a final difference of opinion between him and his fellows on the bench, except in the important case of *Doe, dem., Hindson v. Kersey*, wherein lord Camden, in an argument of great power and learning, maintained, in opposition to the other judges of his own court, and also to the unanimous decision of the king's bench in *Wyndham v. Chetwynd*, that the true construction of the statute of wills required an attestation by witnesses whose competency was *then* unimpeached, and that *they* were not *credible* witnesses, in the meaning of the legislature, whose interests might induce them to dishonest dealing at the time of the attestation, although their incompetency were removed when called to establish the will in a court of justice. The legislature, by passing the statute of the 25 Geo. II., evinced their sense of the policy, if not of the legal correctness, of this construction; and more recently, we believe, it has received the

sanction of eminent real property lawyers on purely legal principles. We may particularize also the cases of *Freeman v. West*, (2 Wils. 165, on the law of freeholds *in futuro*,) *Syllivan v. Stradling*, (ibid. 209, deciding that a plea of *nil habuit in tenementis* is no bar to an avowry under the stat. 11 Geo. II. c. 19,) and *Johnson v. Kennion*, (ibid. 262, as to the extent of the indorsee's claim against the drawer of a bill of exchange,) as cases of importance and authority decided under the auspices of lord Camden.

It was an unlucky period at which the new administration assumed the functions of government, and the first occasion, on which lord Camden publicly appeared in the character of a cabinet minister, was one which drew upon him the reproach of having already deserted the defence of constitutional right to maintain a usurpation of prerogative. The increasing high price of grain, arising from the entire failure of the harvest, induced ministers, a few weeks before the time fixed for the assembling of parliament, by an order in council, to lay an embargo on the export of wheat, in contravention of the existing law. All parties admitted the necessity of the measure; but the ministry justified it as a *legal exercise of prerogative*, on the principle that *salus populi est suprema lex*, and that the power of providing against such extreme contingencies, which must of necessity exist somewhere, was *constitutionally* lodged in the sovereign;<sup>1</sup> while the opposition insisted that the crown could no more legally dispense with or suspend the operation of this law than that of Magna Charta or the bill of rights; that parliament ought to have been specially convened for the purpose of sanctioning the measure *à priori*, or at all events that the government should have sought the earliest possible occasion of admitting its illegality, excusing

<sup>1</sup> Lord Camden at least took this ground; it seems doubtful whether lord Chatham ever distinctly asserted the *legality* of the measure.

themselves by its necessity, and obtaining regular parliamentary absolution by an act of indemnity. Although the matter in dispute between the parties was thus narrowed into a question of mere theory, it involved undoubtedly a constitutional principle of the highest importance; and it was, accordingly, the subject of long and very acrimonious debates in both houses, in the course of which began that personal strife between lords Camden and Mansfield, which afterwards manifested itself on almost every question of a politico-legal character that came before the house of lords.

Lord Camden (who had been, as he subsequently avowed, the chief adviser of the measure,) allowed his warmth of temperament somewhat to overbear his discretion, when he let slip the expression, that if the act in question was an illegal exercise of the prerogative, "it was but forty days' tyranny at most;" words which called down upon him the dignified rebuke of lord Temple, and brought him under the scalpel of the more formidable Junius. The ministry subsequently admitted their want of confidence in their own vindication, by introducing a bill of indemnity for the officers who had acted in execution of the order, in which, however, they persisted in refusing to include themselves who had advised it.<sup>1</sup>

The motley administration which had thus been called into existence by lord Chatham, and which Burke so pleasantly depicted as "a cabinet so curiously inlaid — such a piece of diversified mosaic — such a tessellated pavement without cement, here a bit of black stone and there a bit of white," — and of which the only chance of coherence lay in the controlling genius of its framer, as soon as his immediate influence was withdrawn, fell apart at once into its natural disunion. Early in 1767 frequent and severe at-

<sup>1</sup> Our readers will recollect that Mr. Canning, in a similar case in 1826, applied for an indemnity of the most comprehensive kind.

tacks of gout disabled lord Chatham from any effective participation in the measures of government; and disgust at the arbitrary tone they presently assumed completed his estrangement. Lord Camden, entertaining sentiments so entirely in correspondence with his, viewed the proceedings of his colleagues with little less distaste, although he did not so soon make a formal secession from their ranks. Having protested without effect against the imposition of the American import duties in 1767, and against the illegality of their proceedings with regard to the Middlesex election in the following year, he withdrew himself from the cabinet whenever those subjects were under discussion, and watched their progress through parliament in moody silence. At length, on the opening of the memorable session of 1770, the smothered flame burst forth, and with a fury proportioned to its long suppression. On the discussion of lord Chatham's amendment to the lord's address (Jan. 9th), which expressed a strong censure on the incapacitating vote of the house of commons, the chancellor broke out into unmitigated opposition. He declared that "he had accepted the seals without any conditions, but he had too long submitted to be trammelled by his majesty—he begged pardon—by his ministers; but he would be so no longer; that for some time he had beheld with silent indignation the arbitrary proceedings of the government; that he had often drooped and hung his head in council, and disapproved by his looks those steps which he knew his avowed opposition would not prevent; that, however, he would do so no longer, but openly and boldly speak his sentiments." He characterized the vote of the commons as a direct attack on the first principles of the constitution, and protested that if he were as a judge to pay any regard to it, he should look upon himself as a traitor to his trust and an enemy to his country. And he followed up his declaration of hostility by voting in favor of the amendment.

The standard of defiance thus openly unfurled, it was not to be expected he would abide long in the ministerial tents. On the very same evening, accordingly, lord Weymouth, the secretary of state, moved an adjournment for a week, evidently for the purpose of giving time for the removal of the chancellor and the appointment of his successor. Lords Temple and Shelburne inveighed loudly against this proceeding:—"After the dismissal of the present worthy chancellor," said the latter, "the seals would go a begging; but he hoped there would not be found in the kingdom a wretch so base and mean-spirited as to accept them on the conditions on which they must be offered." So long, however, as the unnatural union subsists—which we have now a lively hope of seeing severed—of judicial and political functions in the person of the same individual, it is rather too much to expect that he should be retained as a coadjutor in the exercise of the latter, by men against whose policy he has declared open war on points of vital importance. Nor was it long before the allurements of power, aided by the personal solicitation of the sovereign, found a successor for the vacant office in the person of Charles Yorke, and that under such lamentable circumstances of defection from his political principles, as to call down upon him the bitter reproaches of his party, to close his brother's door against him, and to irritate his remorseful feelings into the cause of a premature and melancholy death. The premier himself, embarrassed by the difficulties with which he was surrounded, increased as they were by the defection of lord Camden, and of Dunning, his ablest supporter in the house of commons; writhing too under the envenomed attacks of Junius, and himself a reluctant supporter of many of the measures of his own cabinet, abandoned the helm before the end of the same month of January. He also, as well as lord Shelburne and Camden, subsequently avowed that he had been opposed in principle to the adoption of coer-

cive measures against America, and that in 1769 he had unsuccessfully originated in the cabinet a proposition for the repeal of the duties imposed two years before. Taunted with their inconsistency in remaining ostensible partners in measures they condemned, their common defence was, that the temper of the house of commons was too strong to contend against, and that they should have withdrawn only to leave the whole power in the hands of those by whom a system of policy more uniformly objectionable would have been pursued without condition or restraint;—an excuse too much akin to that of the delinquent school-boy, who robs an orchard on the principle that if he does not steal the apples, somebody else will. Had lord Camden's presence in the cabinet availed to overbear or moderate the measures he disapproved, his justification would have stood on better grounds; but by his own avowal it had no such effect; and we cannot therefore but consider his submitting for above two years even to a silent participation in councils which he considered prejudicial to the best interests of his country, as detracting somewhat from the independence and purity of his political character.

In the exercise of his judicial functions, he appears to have conciliated the respect and good opinion of all parties. His extensive legal information, the acuteness and sagacity of his judgment, the perspicuity with which his opinions were propounded, his dignified politeness, more graceful by contrast with the unrefined manners of his predecessor, combined to attract to him the high esteem as well of the profession as of the public at large. Of the soundness of his decrees no proof need be adduced beyond the fact, that one only of them (so far as we can discover) appears to have been reversed on appeal, and that only as to part; and his judgments still continue, we believe, to maintain an authority as high as those of any of the great lawyers who have occupied his seat. The meagre (and sometimes in-



accurate) notes of Ambler and Dickens, confined to the task of giving the dry conclusions of law in the fewest and most ordinary words, convey not, of course, the least idea of the style or effect of his judicial oratory. But that it was of a highly attractive character, we have the testimony of a valuable witness. "I distinctly remember," says Mr. Butler, "lord Camden's presiding in the court of chancery. His lordship's judicial eloquence was of the colloquial kind—extremely simple; diffuse, but not desultory. He introduced legal idioms frequently, and always with a pleasing and great effect. Sometimes, however, he rose to a sublime strain of eloquence: but the sublimity was altogether in the sentiment; the diction retained its simplicity; this increased the effect."

Some of the cases which reached the house of lords while lord Camden occupied the woolsack were of the highest interest, and of them we possess fuller and more faithful reports. We may particularize the writs of error in the cases of Wilkes and Evans the dissenter, and the appeal in the "great Douglas case," in which the chancellor warmly seconded lord Mansfield in affirming the legitimacy of the appellant, and even went so far as to impeach those who held a contrary opinion with something approaching to atheism:—"The question before us is short," he concluded: "is the appellant the son of the lady Jane Douglas or not? If there be any lords within these walls who do not believe in a future state, they may go to death with the declaration that they believe he is not." We may here also most fitly advert to another legal question of much interest, in which he took a prominent part, although it did not come before the house until some time after he resigned the great seal: we mean the case of *Becket v. Donaldson*, in 1774, by which the law of copyright was finally settled as it now stands. A few years before, in the case of *Millar v. Taylor*, the court of king's bench had recognized the existence of a

common law right in an author to publish his works in perpetuity, and determined that such right was not abridged by the statute of Anne. Lord Camden, without directly contesting the natural justice of the principle on which this right at common law was rested, maintained, and was supported in his opinion by a majority of the judges, that at all events it was restrained by the statute, which would otherwise be inoperative altogether. He then proceeded to vindicate the *policy* of thus construing the law, in language which, though it has been often quoted, we extract as furnishing a favorable specimen of his declamatory eloquence :

“ If then there be no foundation of right for this perpetuity by the positive laws of the land, it will, I believe, find as little claim to encouragement on public principles of sound policy or good sense. If there be any thing in the world common to all mankind, science and learning are in their nature *publici juris*, and they ought to be free and general as air or water. They forget their Creator as well as their fellow creatures, who wish to monopolize his noblest gifts and greatest benefits. Why did we enter into society at all, but to enlighten one another’s minds, and improve our faculties, for the common welfare of the species ? Those great men, those favored mortals, those sublime spirits, who share that ray of divinity which we call genius, are intrusted by Providence with the delegated power of imparting to their fellow creatures that instruction which Heaven meant for universal benefit : they must not be niggards to the world, or hoard up for themselves the common stock. We know what was the punishment of him who hid his talent, and Providence has taken care that there shall not be wanting the noblest motives and incentives for men of genius to communicate to the world the truths and discoveries which are nothing if uncommunicated. Knowledge has no value or use for the solitary owner ; to be enjoyed, it must be communicated : *scire tuum nihil est, nisi te scire hoc sciat alter*. Glory is the reward of science, and those who deserve it scorn all meaner views. I speak not of the scribblers for bread, who tease the world with

their wretched productions ; fourteen years is too long a period for their perishable trash. It was not for gain that Bacon, Newton, Milton, Locke, instructed and delighted the world. . . . When the bookseller offered Milton five pounds for his *Paradise Lost*, he did not reject it and commit his poem to the flames, nor did he accept the miserable pittance as the reward of his labors ; he knew that the real price of his work was immortality, and that posterity would pay it."

On this question of literary property, we feel bound humbly to take part against his lordship, at all events as to the policy of the existing law, and to avow our concurrence in the sentiment of Mr. Justice Wilmot, that "the easiest and most equal mode of encouraging the researches of men of letters, is by securing to them the property of their own works"—the same property in the produce of their mental labor, which all other persons enjoy in the produce of their labor of every other kind. The latter part of his lordship's argument appears to us (with all deference be it spoken) to border somewhat upon the region of cant. Can it be believed that Milton—however exalted his views in the composition of his great work—would not gladly have received for it as high a price as the booksellers would have been willing to pay? Lord Camden, we suppose, would have heard with much astonishment, if not with some scorn, of the sums which the great author of our time, whose memory his country is now delighting to honor, received as the price of *his* works—received, high-minded and unselfish as he was, without scruple because without reproach ; "not displeased," as he feared not to avow, "to find the game a winning one, although he should most probably have continued it for the mere pleasure of playing." The question is not, however, what may be the views of authors in publishing, but what is the fair and just reward that should be rendered to them for the labor of which society enjoys the benefit. Nor do we see why the "scribblers for

bread," those of them at least who do not prostitute their pens to unprincipled and vicious purposes, are to be mentioned with such contempt. We suspect that William Shakspeare, when he gave the world some of the first and noblest of the immortal products of his genius, was pretty much in the situation of a "scribbler for bread:" and one of the greatest of lord Camden's own contemporaries — Samuel Johnson — might have furnished him with an example of one who, for years together, had no resource for a scanty subsistence but in the exercise of his pen, from which certainly flowed nothing that could deserve the contemptuous designation of "perishable trash."

The administration of lord North, framed upon the avowed principle of carrying into effect the coercive policy of the court, found in lord Camden, as was to be expected, a vehement and uniform opponent. Wilkes's interminable affair first engaged the attention of parliament. In all the successive debates that arose on this subject during the session of 1770, we find the ex-chancellor assailing, with all the force of his argumentative eloquence, the proceedings in the house of commons, and embracing, moreover, every opportunity of measuring weapons individually with lord Mansfield. In the same year, the doctrine again propounded by the chief justice, on the trials of Woodfall and Miller, as to the province of the jury in cases of libel, made his own personal conduct and judicial character the object at once of the rancorous invective of Junius, and the more tempered but scarce less pointed hostility of his rival in the house of lords. Whether the personality of attack which seasoned the political warfare of lord Camden against his great opponent, had its source, as is affirmed by Horace Walpole, in a long-cherished personal animosity, or was imbibed from the prejudiced resentments of lord Chatham, or grew unconsciously out of the many subjects of party strife between them, we have now no means of ascertaining. Whatever

was the cause, he, as well as lord Chatham, indulged in an acrimony of censure not only upon the opinions, but upon the motives of the chief justice, which certainly little dignified the cause they advocated, while it was unwarranted by the circumstances of the case, and entirely undeserved by the general character of the great magistrate who was the object of it. We need not enter into the detail of this controversy, which was observed upon in the life of lord Mansfield in a former volume,<sup>1</sup> and which must be familiar to many of our readers. The constitutional timidity of the chief justice shrunk from taking up the glove which his bolder and more ardent antagonist threw down to him, and the question did not, until twenty years later, become the subject of a formal discussion.

During the whole progress of the ill-advised struggle with America, lord Camden opposed the fatal measures of impotent and wanton exasperation which were successively proposed, with a force and fervor second only to those of his illustrious friend Chatham. We find him supporting, by his speeches as well as his votes, almost every one of the successive motions by which the opposition endeavored to force upon the government a conviction of the obstinate and ruinous folly of their proceedings; and he continued an active and efficient laborer in the cause when the energies of its great leader were oppressed by bodily infirmity, and when, after kindling afresh into a brilliant but short-lived splendor, they were quenched finally in death. Nor did his opposition, any more than that of lord Chatham, admit of compromise or modification, or content itself with arraigning the impolicy and danger of the contest. He unreservedly denounced Great Britain as the original aggressor, and justified the resistance of America as that of a brave people, standing upon the natural rights of mankind and the immutable laws of justice, to a vindictive and intolerable op-

<sup>1</sup> Law Magazine, Vol. v., p. 95, et seq.

pression. In 1775, he originated a bill for the repeal of the Quebec government act, and on that occasion came again into angry collision with lord Mansfield. In 1778, he drew up the lords' protest against the manifesto of the American commissioners, which placed the hostile provinces under martial law, and upon which, in a speech of great power and effect, he had poured out in vain the full vials of indignant execration. At length, on the discussion of the address relative to the rupture with Holland, in January, 1781, he expressed his determination to withdraw himself from his fruitless attendance in the house. "He had discharged his duty to the best of his poor ability so long as it promised to be productive of the slightest or most remote good; but he declined giving their lordships or himself any further trouble, when hope was at an end, and when even zeal had no object which could call it into activity." During the remainder of that session, accordingly, his name occurs no more in the debates. But, on the re-assembling of parliament in November, the supremacy of the minister had begun to totter, and his lordship re-appeared to contribute his efforts towards its final overthrow, which took place, as is well known, in the March following: and on formation of the new ministry, lord Camden was installed in the honorable and not too laborious post of president of the council.

In most of the other questions of public interest, not connected with the war, which were agitated during lord North's administration, we find lord Camden taking an equally active share. He warmly seconded the motion for an inquiry into the affairs of Greenwich Hospital; was among the foremost in censure of the conduct of the government with regard to Ireland; supported with much zeal lord Shelburne's motion for an inquiry into the civil list, in February, 1780; and, on the contractor's bill of the same session, ventured single-handed to engage both lord Mans-

field and lord Thurlow. Immediately on the accession of the whigs to power, the latter bill was re-introduced, and again lord Camden lent his zealous assistance to secure its success, against the open hostility of the king and the "king's friend"—the self-seeking and double-dealing Thurlow.

We must glance rapidly over the remaining years of lord Camden's life, in which, with one or two exceptions, he played a less prominent part in the political drama. During the brief reign of the coalition ministry, he returned to the ranks of opposition, and warmly attacked Mr. Fox's India bill, as calculated, while it violated to a wanton and unreasonable extent the chartered rights of the company, to augment dangerously the influence of the crown, and to call into existence a "fourth estate," which might ultimately overturn the constitution altogether. When the coalition vessel had gone to wreck upon that memorable measure, lord Camden would have been reinstated at once in his former office, but for the necessity of providing for lord Gower, who had spontaneously tendered to the new premier the aid of his influence and services, some post of prominent dignity and consideration. That noble lord, accordingly, held the presidency of the council for a short time, until the difficulties which beset the ministry were overcome, and then resigned it to lord Camden.

This interval he had employed in visiting Ireland, and acquiring a mass of information as to her condition and grievances, which he made eminently available on the discussion of the Irish commercial propositions in the following session. Although he had now attained his seventy-second year, his health and personal activity, despite an occasional fit of the gout, continued little impaired, and he was still able to take an active part in most of the important measures that distinguished the early years of Mr. Pitt's ministry—as the East India judicature bill, the wine excise bill,

the East India declaratory bill of 1788, &c. The second of these he defended purely on the ground of the necessity created by the great defalcations in the revenue, and the extensive frauds practised in the trade; admitting at the same time the unconstitutional and dangerous character of the powers committed to the excise officers. "The extension of the excise laws," he said, "was a dangerous system, and fraught with multifarious mischiefs. It unhinged the constitutional rights of juries, and overturned the popular basis of every man's house being his castle; it armed petty officers with powers against the freedom of the subject, and put it into the power of the excise to insult the innocent, and disturb the tranquillity of an unoffending subject. He had long imbibed these principles; he had been early tutored in the school of our constitution, as handed down by our ancestors, and he could not easily get rid of his early prejudices. They still remained hovering about his heart, and must, on this occasion, come forward as the new sprouts of an old stalk. He had by this time received a new accession of dignity, having been created (May 13, 1786) viscount Bayham, of Bayham Abbey, in the county of Kent, and earl Camden. His virtuous and patriotic successor was worthily honored with the coronet of a marquis.

At the period of the king's illness in the winter of 1788-9, the conduct, in the house of lords, of the measures introduced by government for the establishment of a regency, devolved upon the president of the council. The opposition, while they contended strenuously in favor of the paramount right of the heir apparent, as strongly deprecated its being drawn formally into discussion, and charged principally upon lord Camden the odium (which no doubt belonged equally to the whole cabinet) of its being made a parliamentary question. One of the proposed restrictions upon the exercise of sovereignty by the regent — the suspension



of the prerogative of creating peers — lord Camden denied could possibly produce any inconvenience, since parliament might in effect grant a peerage in any case of peculiar desert, by passing an act enabling the regent to bestow the dignity; and he quoted several instances of such creations. Called sharply to order for the *republicanism* of his doctrines, he endeavored to explain and qualify, and at last condescended to something very like a retractation; while the chancellor (all the while engaged in an unprincipled intrigue with the prince's party) sturdily re-asserted the correctness of his colleague's theory in its full extent. The rival doctrines that figured in these debates were throughout curious specimens of the political *asymptote* — approaching nearer and nearer to each other, but effectually prevented by party hatred and self-interest from the chance of ever coalescing. Thus, Fox fell foul of lord Camden for imputing to him that he had contended for the prince's right to *assume* the sovereignty, while, as he explained, he had only maintained his superior right to exercise it when accorded to him by parliament — a *superiority* which must be inherent in his person, and therefore independent of and antecedent to the vote of parliament. It was a contest, however, in which, we fear, the maintenance of abstract principles had in truth as little concern as might be.

Dr. Watson gives us an anecdote from which he would have us infer the entire subserviency of lord Camden at this period to Pitt. "I asked him," says the bishop, "if he foresaw any danger likely to result to the church establishment from the repeal of the test and corporation acts; he answered at once, none whatever; Pitt was wrong in refusing the former application of the dissenters; but he must be now supported." Now, even supposing the worthy prelate's partizanship has not a little distorted the facts, the anecdote itself proves that lord Camden was not in the habit of cloaking his opinions with any disguise; and the cir-

cumstances of the time (1790) when, if ever, the union of a strong and efficient government was necessary to the country, ought to be taken into consideration. The bishop records another expression of lord Camden about the same period, to the sincerity of which the political conduct of his whole life bore testimony:—"I remember his saying to me one night, when the chancellor (Thurlow) was speaking contrary; as I thought, to his own conviction,—“There now, I could not do that; he is supporting what he does not believe a word of.” The very next occasion (and it was the last) on which lord Camden bore a part in debate, was one which eminently displayed his continued independence of thought and action, while it called into exercise a host of old associations and sympathies; we mean the introduction of Mr. Fox's libel bill in 1792. He rose, says the Parliamentary History, and prefaced his speech by a very affecting address, declaring that he had thought never to have troubled their lordships more—"The hand of age was on him, and he felt himself unable to take an active part in their deliberations. On the present occasion, however, he considered himself as particularly, or rather as personally, called upon. His opinion on the subject had been long known; it was upon record; it was upon their lordships' table. He still retained it, and he trusted he should be able to prove that it was consonant to law and to the constitution." He then proceeded to vindicate his opinions in a speech, which, as we may pronounce from the report of it in the Parliamentary History, displayed much constitutional knowledge and laborious research, and, if we may judge from the encomiums lavished on it by the succeeding speakers, rivalled in the graces of a dignified and forcible eloquence the best efforts of his more active years.

This was, as we have intimated, the last public appearance of lord Camden on the stage of political life. He continued, however, to occupy his post of president of the

council until his death, which occurred on the 13th of April, 1794, at his house in Hill street, Berkeley square, in his eightieth year; thirteen months only after that of his great antagonist lord Mansfield. His remains were deposited in the family vault at Seal, in Kent.

Few public men, probably, have been more generally or more enduringly beloved in private life than lord Camden. Benevolent and affectionate, fond of social intercourse, and gifted with a flow of spirits which scarcely ever failed him, he not only retained his intimacy with the associates of his early years, but made numberless new friends, from all of whom he seems to have won golden opinions and warm attachments. In the several relations of private life he is represented as having been most exemplary. The love of money was the chief fault imputed in his life-time to him, as to others who have filled the same exalted station before and since. He does not certainly appear to have been profuse, but we find in no part of his conduct evidence that he was sordid. Horace Walpole, whose praise, as well of friends as foes, was "venomously nice," has left us an encomiastic portrait of him, disfigured only by a single shade. "Chief justice Mansfield had a bitter antagonist in the attorney general Pratt, who was steady, warm, *sullen*, stained with no reproach, and a uniform whig. Nor should we deem less highly of him because private motives stirred him on to the contest;—alas, how cold would public virtue be, if it never glowed but with public heat! So seldom, too, it is that any considerations can bias a man to run counter to the color of his office and the interests of his profession, that the world should not be too scrupulous about accepting the service as a merit, but should honor it at least for the sake of the precedent." In reproaching with *sullenness* a man whose disposition was of the very essence of cheerfulness and good humor, the noble writer seems to have been most unfortunate in his choice of a depreciatory epithet.

It was quite in keeping with the other features of lord Camden's character, that he should be a little of an epicurean, and a little indisposed towards exertion, bodily or mental, unless when roused to it by the necessity of business or the excitement of strong feeling. He seems to have been, in his younger days at least, a professed disciple of the noble science of gastronomy in general, and (as became a native of a western county) an especial enthusiast in his admiration of that more pleasant than wholesome beverage, cider. Almost every one of his letters to an early friend, who had settled upon an Herefordshire living, (written during the first five or six years of his bar life) contains a commission to send up a hogshead for his own or his friends' behoof, or records the receipt of one. We have detected also occasional notices, occurring here and there in postscripts, respecting the transmission to the Temple of hares, woodcocks, and other such desirable products of the plains of Herefordshire. Like many other distinguished persons, too, he was throughout his life a great reader of novels, his taste for which extended itself even to the interminable and now forgotten tomes of Scuderi; the *Grand Cyrus* and *Philidaspes* furnished many an evening's repast after the weightier matters of the law had occupied the morning. He was also, at least before law un-harmonized him, a professed votary of Euterpe; and we have him recommending his friend Davies, who was planning an opera to be set to music by Handel, to "lie upon his oars" until he, Pratt, could give him directions as to the genius of musical verse, the length of the performance, the numbers and talent of the singers, the position of the chorusses, and all the details of an accomplished adept in the science of harmony. Many of the literary men of his time enjoyed an intimacy with him. Among them was Garrick, who was not a little vain of the distinction. He accosted Boswell in the street one morning—"Pray now, did you—did you meet a little

lawyer turning the corner, eh?" "No, sir," said Boswell; "pray what do you mean by the question?" "Why," replied Roscius, with an affected indifference, yet as if standing on tiptoe,— "lord Camden has this moment left me. We have had a long walk together." "Well, sir," pronounces Johnson on hearing the story, (Johnson, as sir Joshua Reynolds observed, considered Garrick in a manner his own property, and would allow nobody either to praise or blame him without contradicting them,) "well, sir, Garrick talked very properly. Lord Camden *was a little lawyer* to be associating so familiarly with a player." Poor Goldsmith, whose happy vanity set him down in his own esteem as the prime object of interest and admiration in whatever company he graced with his presence, was sadly piqued that lord Camden, whom he met at lord Clare's table, did not render him due homage. "He took no more notice of me," complained the doctor, "than if I had been an ordinary person." The general courtesies of society did not compose a condiment sufficiently piquant for Goldsmith's taste, which longed for the more highly-seasoned dishes of compliment and flattery.

Lord Camden was in stature below the middle size. His full fair-complexioned countenance, blue eye, and clear open brow, were more expressive of a frank good-humor than of profundity of thought. He was subject, as we have before stated, to occasional attacks of gout, which did not however make a martyr of him as of Thurlow. He was, we are told, particularly afraid of catching the small-pox, which he had never had; especially when lord Waldegrave died of it, on which occasion he fled from its dangerous neighborhood into the country. He long survived, however, all these apprehensions, and sunk at length only under the gentle and gradual pressure of old age.

Our readers, we fear, will have had too much reason to complain of the absence, in these pages, of those traits of personal portraiture, those lesser lights and shades of indi-

vidual habits and manners, which constitute after all the life and soul of biography. But no kindred or friendly pen has been employed to lay before the world, like a North or a Boswell, with all the freedom and detail of familiar intercourse, the daily doings of lord Camden's private life, and all the minute picture of his thoughts, his habits, his peculiarities, and his foibles; nor have the outpourings of his heart, as in the case of Cowper, been unveiled to us in his familiar correspondence: few of his letters are in print, but they are such as to make us wish for more. We are driven, therefore, to seek such memorials of him as are to be found scantily dispersed over the memoirs and reminiscences of his contemporaries. Had his nephew, Mr. Hardinge (the Welch judge), lived to fulfil a promise he made to the late Mr. Nichols, of furnishing a memoir of his uncle for the "Literary Illustrations," we might have had a far richer mine of anecdote and interest to work into: as it is, we have some apprehension that our sketch may less resemble a faithful portrait, exhibiting the features and expression of its original, than a figure in an indifferent caricature, whose identity is made known chiefly by the quotation that issues from its mouth.

Besides the two pamphlets we have already mentioned as being attributed to lord Camden, he avowed himself to Mr. Hargrave as the author of a tract entitled "An Inquiry into the Process of Latitat in Wales," printed in that gentleman's collection of law tracts. Like many others of our most eminent lawyers, he never applied his powers to the production of any work of permanent utility and importance. Nevertheless, his name will not perish. As a lawyer, his authority continues to be held in reverence by the profession; as a politician, his memory must be honored while independence and public worth are cherished among Englishmen; as a man, his virtues are embalmed in the affectionate remembrance of the few who yet survive to recall the memory of his friendship.

## ART. II.—REPORTS OF CASES IN THE VICE CHANCELLORS' COURTS OF THE STATE OF NEW YORK.

1. *Reports of Chancery cases decided in the Eighth Circuit of the State of New York, by the Hon. Frederick Whitelsey, Vice Chancellor.* By CHARLES L. CLARKE, Counsellor at Law. Vol. 1. Rochester: David Hoyt, 1841.
2. *Reports of cases argued and determined in the Court of Chancery of the State of New York, before the Assistant Vice Chancellor of the first Circuit.* By the Hon. MURRAY HOFFMAN. Vol. 1. New York: Halsted & Voorhies, 1841.

FROM the rapid issue of New York reports, a stranger would be tempted to believe, that the profession in that state, like the Athenians at Mars Hill in St. Paul's day, "spent their time in nothing else but either to hear or tell some new thing." In the short period of less than eleven years since the codification of their laws, by a revision proceeding mostly upon the plan of consolidating the old statutes, conforming them in express terms to the decisions of the courts, and authoritatively *declaring* common law rules, we have seen twenty-one volumes of Wendell's reports, seven of Paige's chancery reports, two of Edwards's reports of vice chancellor McCown's opinions, to say nothing of the reports of the superior courts of New York city, successively delivered from a groaning press. And here we have the opinions of the vice chancellor of the eighth circuit, and of the *assistant* vice chancellor of the first circuit. The mere thought of it makes one sigh for the good old times, when a sort of traditionary knowledge of the current decisions was kept up, by means of the familiar chat of the elders and sages of the law with the young templars, in the cool cloisters of the inns of court. Even

the more formal reading, on the statute of uses, executory devises, or such like grave matter,—which we fear those youngsters sometimes irreverently deemed a bore—was nothing to this. How would it startle the ghost of one of those old readers, could he look into a modern law library and see chancery reports of the *eighth* circuit of New York, standing in sober calf, side by side, with his Coke and Plowden. Vague questionings, whether the vice chancellor were Mohawk or Algonquin; whether counsel argued in deer skin and feathers instead of robe and wig; or whether they told off their *points* by belts of wampum,—would trouble his misty brain—nor altogether without probable cause. It is but thirty years since the title to a corn-field in the now populous city of Rochester was tried by wager of battle between a bear and the planter of the corn, whom Bruin doubtless regarded as a mere casual ejector. Within the same period the sacrifice of the white dog, with rites unholy, has been offered by heathen Indians, within the very purlieus of the vice chancellor's court.

Our readers know enough of the wonderful history of western New York, to be less surprised; but we have thought that some preliminary explanation and account of the organization of the New York courts, and of the practical working of their judiciary system, might be not unacceptable; and, in truth, *this*, rather than a review of the publications of Mr. Clarke and Mr. Hoffman, is our purpose in this article.

The supreme court of New York, as now constituted, has three justices, who make the court in bank, and eight circuit judges, who preside at the trials of issues of fact. The state is divided into eight judicial districts, and a circuit court and court of oyer and terminer is held twice annually in each county. Except in special cases, a justice of the supreme court has nothing to do with the *nisi prius* business of his court. The circuit judge possesses the power of a justice of the supreme court, at chambers, and holds



quarterly terms for the purpose of hearing arguments upon motions for new trials in causes tried upon his circuit.

The circuit judge is moreover (except in the first and eighth circuits) an officer of the chancellor's court with the title of vice chancellor. He has, in this capacity, concurrently with the chancellor and exclusively of any other circuit judge, all the original jurisdiction of the chancellor in the following cases: 1. When the cause or matter of controversy shall have arisen within his circuit. 2. When the subject matter in controversy shall be situated within such circuit; or where the defendants or persons proceeded against or either of them reside within such limits, subject to the appellate jurisdiction of the chancellor.

The first circuit, in which is the city of New York, has a vice chancellor in addition to the circuit judge. This officer was appointed in 1831, and invested with all the equity powers formerly exercised by the circuit judge.

On the 27th day of March, 1839, laws were enacted for the appointment of a vice chancellor of the eighth judicial circuit and of an assistant vice chancellor of the first circuit. The continuance of the latter act was originally limited to three years. The limitation was however removed at the next session of the legislature, and the powers of the assistant vice chancellor, at first restricted to the hearing of causes belonging to the fourth class of calendar causes,<sup>1</sup> or causes brought to a hearing upon pleadings or upon pleadings and proofs, were extended to the hearing "of any preliminary motion for the suppression of testimony in any cause, where notice of such motion is given after the proofs are closed."<sup>2</sup> The chancellor was also authorized to refer *any* cause pending before him to the assistant vice chancel-

<sup>1</sup> 1st class, causes to be heard on bills taken as confessed; 2d, on pleas and demurrers; 3d, bill and answer; 4th, pleadings or pleadings and proofs.—Rules of 1837, 91st rule.

<sup>2</sup> New York Session Laws of 1840, chap. 314, page 263.

lor and to appoint a special term to be held by the assistant vice chancellor, at such places out of the city of New York, and to continue for such time, as he shall deem proper; at which terms, all causes belonging to either class pending before the chancellor or any vice chancellor may be noticed for hearing and be heard and decided by the assistant vice chancellor. He is thus made a kind of residuary legatee of all the unfinished equity business of the state.

The court of chancery is now composed of, first, the chancellor, having the original jurisdiction without the territorial limits of the vice chancellors, and appellate jurisdiction in all cases, two special vice chancellors, six vice chancellors who are also circuit judges, and an assistant vice chancellor.

Premising that the reports, whose title pages head this article, exhibit the first fruits of the laws of 1839, to which we have alluded, we propose to cite a few facts showing the condition of the legal tribunals at the time those laws were enacted.

We are indebted to a pamphlet by Theodore Sedgwick, Jr.,<sup>1</sup> for much accurate and valuable information in relation to the court of chancery and particularly in the first circuit.

The reasons are sufficiently apparent, why the principal delay should occur in the disposal of causes in the fourth class. Accordingly we find upon the calendar of the vice chancellor of the first circuit, for January, 1838, out of two hundred and six causes, one hundred and thirty in the fourth class, in which the date of the issue, that is to say, the time at which they were in readiness for hearing, is as follows:

In one the date of the issue is in 1829; three, 1831; five, 1832; twenty, 1833; twenty-nine, 1834; twenty-four, 1835; twenty-two, 1836; and the remainder in 1837.

<sup>1</sup> A statement of facts in relation to the delays and arrearages of business in the court of chancery of the state of New York, by Theodore Sedgwick, Jr.

Not one of these long delayed causes was heard at the January term, and they reappear, with the exception of one, in which the parties seem to have been wearied into a reluctant settlement, and with additions, on the April calendar. And when that April term had passed, six causes in the fourth class had been heard out of one hundred and thirty-two, and the rest were put over to the July term, — and so through the July and October terms. It may be asked why did not the profession avoid this accumulation of causes, by commencing their business, as they might have done, before the chancellor. Alas, the chancellor's calendar is little less in arrear. An instance at random — at his term in August, 1837, out of eighty causes noticed for hearing, forty were in the unlucky fourth class, twenty-four of them being appeals which have priority in all cases. The chancellor disposed of four of these causes at that term, and the remainder went over to reappear on the calendar for January term, 1838. There were upon this January calendar forty-three causes in the fourth class, of which twenty-nine were appeals. And what was accomplished at this term? Why seven appeals and three original causes were heard and the remainder *went over*. It is apparent from these facts, that the appellate business of the chancellor is constantly gathering upon him, and this he must be quit of, before he can hear causes in which the bills are filed before himself.

We have confined our illustrations to examples from the fourth class, and here in truth is the great pressure. The other classes being of less difficulty and entitled to priority of hearing are kept within some compass.

Mr. Sedgwick records the answer of vice chancellor McCown, made to the inquiry of a young counsellor, when he expected to take up the fourth class — “Sir, I never expect to see the fourth class again.”

But that this state of things may not be set down exclusively to the population and commerce of New York city,

let us look at the eighth circuit and see the extent of its embarrassments. This circuit, we are informed by Mr. Clarke's preface, contains a population of over 325,000 souls. He observes, that the enterprise, which has swelled the population and developed the resources of this circuit with such astonishing rapidity, has at the same time crowded the courts with business and the legal profession with employment." Doubtless that enterprise has given birth to an unusual number of contracts, which have been in their turn the parents of law suits; but we think we might show, had we space and time, that a general deficiency of circulating capital has had much to do with this crowding of the courts, and that bad legislation has aggravated the evil. The main fact, however, is that the courts *are* crowded with business. The best documentary evidence within our reach is furnished by the report of the commissioners appointed to digest and report a judicial and equity system, made to the legislature of New York, January 2, 1838. They state that the number of causes on the calendar of the circuit court, in the several counties composing the eighth district, at the circuits next preceding November, 1837, was as follows: Erie 470, Livingston 62, Monroe 241, Niagara 152, Orleans 7, Chautauque 59; no return from Genesee.

There were filed during the same year 1078 bills in chancery in the clerk's office of the eighth circuit. The circuit judge who tried or should have tried those issues, and the vice chancellor before whom all this equity business came, were, under the then system, one and the same person. It is true that much of this business was of a mere formal character. The issues at the circuits were made in a majority of cases simply for delay; they were disposed of by inquests. A large proportion of the bills in chancery was for the foreclosure of mortgages in the ordinary routine of collection. Five hundred and eighty-six causes were upon the vice chancellor's calendar in that year in the first class,

—bills taken as confessed after an appearance of the parties defendants. We may assume nearly all these to have been mortgage cases. Yet after all deductions, there was in the whole, a mass of litigated business altogether too great for the shoulders of a single judge. At the November term there were twenty-one causes in the fourth class on the calendar, though the vice chancellor had given out previous to the term, that he should not take up any litigated business. And what says the clerk in chancery at the close of that year—"No litigated business has been disposed of since our present vice chancellor (Nathan Dayton, appointed February, 1838) assumed the duties."<sup>1</sup>

But nothing can better illustrate the condition of the tribunals in New York, than the fact that the whole number of causes noticed for trial at the circuit court, held throughout the state next before November, 1837, was 3510. We have said that there are two circuit courts held annually in each county—in the county of New York there are four.

These 3510 causes are the aggregate of the calendar of the fall circuits. Of the spring circuits, we have no precise information.

Each county has moreover its court of common pleas, holding four terms a year. At the terms of the common pleas held next before the same date, the number of issues of fact noticed for trial was 1765.

Contrast this statement with the facts stated in a return made by order of the English house of commons, and which may be found in the appendix to the report of the New York commissioners.

The whole number of causes tried in the court of king's bench, at the nisi prius sittings in Middlesex and London, and upon the eight circuits, during the year ending on the

<sup>1</sup> Letter to Theodore Sedgwick, Jr., quoted at page 79, of his pamphlet, *Statement of facts, &c.*

last day of Easter Term, 1836, was one thousand and one. Of these, seven hundred and twenty-five were defended. We do not learn from the return the whole number entered for trial except at the London and Middlesex sittings, at which during the year 614 cases were upon the calendar; 371 were tried and 224 of those tried were defended. But we can make a near approximation to the truth. The whole number of final judgments entered in the court of king's bench for the same period is 7768; the number of bills of costs taxed by default without trial is 4533. This would leave 3235, which might have been noticed for trial so far as we can gather from the register of taxations.

This is for the whole year—for all England—and it is less than the number noticed in the supreme court, the corresponding tribunal in New York, at the fall circuits of a single year merely.

But even this is too favorable to New York, for we have seen that of the thousand causes tried by the English courts, about three fourths were litigated, while under the New York system, by which causes, in which no affidavit of merits is filed, are taken out of their order on the calendar and disposed of by inquest, the non litigated business is finished before the litigated causes are reached.

We know indeed that 1837 was an extraordinary year, and that the greater part of this enormous business grew out of commercial embarrassments and distress, the disorder of the financial system of the country operating most severely upon the people of New York. The deficiency of circulating capital, particularly in the western part of the state, leads to extensive transactions upon credit, followed by collection suits. It also involves numberless violations of the usury laws. And though these statutes were in 1837 evaded with the greatest ease, still the fact of usury, even where there was no possibility of establishing it in evidence, furnished good ground for an affidavit of merits—and the

filing of such an affidavit was potent for delay, when the calendar was crowded. This was often interposed in cases where the debtor would have indignantly repelled the imputation of being willing to use the defence to work a forfeiture of the sum loaned. An inspection of these reports, particularly Mr. Clarke's, (from the fact that the eighth circuit is newly settled, with every appliance for the creation of wealth in rich abundance, *except circulating capital*, with the concomitant high profits and daring enterprise,) will illustrate our views, by showing the number of cases involving that defence. It will show too that another *great* head of equity business is the creditor's bill, as it is familiarly called,—a statutory proceeding for the purpose of reaching choses in action intangible by execution, and uniting the properties of a bill of discovery with the New England trustee process.

The legislature of 1839 contented themselves with administering a temporary remedy to the delays, amounting almost to a denial, of justice, by the creation of the two new officers of the court of chancery, whose opinions are given to the world by Mr. Clarke and Mr. Hoffman. Their successors in 1840 struck at the roots of the evil.

They enacted, that judgments in the courts of law may be entered at any time in term or vacation—that in actions upon any written instrument or record, if the plaintiff shall describe the instrument in his declaration or annex a copy of it, he may disregard any plea unless verified by affidavit or accompanied by the general affidavit of merits. Hence, of such actions those only which are to be litigated go upon the calendar, and the plaintiff is apprized of the intended defence at an early stage of the proceedings. They have made the taxable costs in all the common law courts of record the same, and have put those courts upon a par in respect to the lien of their judgments. They have very greatly diminished the costs of collection cases.

One great benefit resulting from these provisions is the diminution of inducements to bring suits in the supreme court, and that they throw a vast amount of business, which has cumbered the circuit calendars and in a less degree those of the court in bank, into the courts of common pleas.

They, also, by an act in relation to the foreclosure of mortgages in chancery, have made the filing of a notice of *lis pendens* equivalent to personal notice to judgment creditors to come in and redeem; and the chancellor by rule has directed such causes, when the bill shall be taken as confessed, to be brought to a hearing at the special sessions terms held by *himself* and each of the vice chancellors, twice in each month.

The principal object however in the latter act was the relief of mortgagors by diminishing the costs of foreclosure. This has been most effectually done, but it is a little surprising that the attention of the legislature was not turned to another remedial act, of vastly more moment to the debtor than the amount of a solicitor's fees. When upon the foreclosure of a mortgage payable in instalments of which but part are due, the master reports (and it is *seldom* he reports otherwise) that the premises cannot be sold in parcels without material injury to the interests of parties; the decree is that the whole premises be sold, and that from the proceeds the master pay to the complainant the whole amount secured by the mortgage, or so much as the proceeds of sale will pay. And, thus, in consequence of the purely technical principle that the sale extinguishes the lien of the mortgage—at the sale, the creditor bids in effect as if he were to pay cash for the amount, but actually with a credit according to the terms of the mortgage for the residue not due, while other bidders if they purchase must pay the whole bid in ready money. This renders competition very unequal, since in practice in the greater part of the state money cannot be commanded upon securities without usurious in-



terest. The mortgagee has the matter in most instances entirely in his own power, and takes the premises at the price which suits *him*. Every man in the state knows this fact, yet no man in the legislature suggested the obvious remedy. Abolish the technical, root and branch; away with it as has been done with other rules which there were more reasons for retaining. Let the mortgaged premises be sold as a whole, if it be advantageous so to sell them; but let the purchaser pay, as the mortgagor contracted to pay, cash for the sum due and costs, and the residue at the time and in the manner prescribed by the condition of the mortgage. If there is a deficiency upon the sale, deduct that deficiency from the cash payment, and let execution go for it at once. Let the mortgage remain a lien for all instalments falling due after the master's sale, and enforce payment by an order of sale to be entered upon the foot of the decree, in the same manner as when payments are now made after decree. All persons would then compete upon equal terms, and the unfortunate debtor or his creditors receive the benefit of that competition. We hazard nothing in saying, that had the law been so amended in the winter of 1836-37; it would have saved more to the persons against whom decrees passed in a single year, than the reduction of solicitor's fees will do in ten.

More extensive alterations in the judiciary system are now proposed. The legislature at their late session have taken the initiatory steps towards an amendment of the constitution, to the effect that upon its adoption the court of chancery shall consist of a chancellor as presiding judge, and not less than two nor more than four assistant chancellors, the whole to sit in review of appeals from the decisions of any one of them; and also that the supreme court shall consist of a chief justice and not less than two nor more than four judges; the legislature to have the power to constitute not more than two other courts of law pos-

sessing coördinate jurisdiction with the supreme court, each to be composed of not more than five nor less than three judges, a selection to be made from the present vice chancellors and circuit judges in making the necessary appointments; and their respective offices, as at present constituted, to be abolished.

That the legislature may provide by law for the trial of issues joined in any court before the judges of the same or any other court; and that the legislature may constitute a court of review, to be composed of the judges of the court of chancery, the supreme court, and the new courts of coördinate jurisdiction, for reviewing and correcting the decisions of each other, before the same shall be removed to the court of errors; the judges of the court whose decisions are brought in question to be excepted from the court of review.

If the largest number were adopted in all the courts proposed, it would add five new judges to the judicial force of the state. It is going back to the old system of having the causes at nisi prius tried by the same judges who decide in bank; the same system which under the administration of Kent, and Spencer, and Van Ness, covered the supreme court of New York with enduring fame. The proposed amendments must be approved by the next legislature and by the people at the election in November, before they become a part of the constitution.

We must now say something of the reports, the titles of which stand at the head of this article, and first of Mr. Hoffman's. He is well known to the profession as the author of an elaborate and admirable work on chancery practice, and of an earlier work on the practice in the master's office. The same copious learning, which characterizes those works, is exhibited in his opinions, and sometimes we think to an extent of questionable propriety. We should be sorry however to lose for any such reason the full and learned history

of the law of charitable uses contained in the opinion in *Wright v. Trustees Meth. Church*, page 244. Much that must be considered as advisory to the parties merely is inserted in his decisions. In the very first case, for instance, *Heyer v. Burger*, ~~the~~ chancellor Hoffman determines that the bill should be dismissed for want of jurisdiction, *a point not raised by counsel*, and yet proceeds to examine and discuss all the points which counsel *had* made. Throughout his opinions, authorities are not only stated but copious extracts are given, the facts of the case under consideration are compared with those in the authorities cited *seriatim*, and the conclusion arrived at by way of synthesis. This is not in our judgment the best style for the bench, however appropriate it may be for the investigations of the bar.

The case of *Dias v. Glover*, page 76, is another example of a decision based upon a point not made by counsel. In *Hutchinson v. Reed*, page 321, after arriving at the conclusion that the cause should stand over with liberty to amend by adding parties, eight pages are devoted to an examination of the question, whether the new parties should be brought in as plaintiffs or defendants. Now, while these things are creditable to Mr. Hoffman, as proving his strong desire to promote substantial justice and avoid litigation, we cannot but think that a habit of deciding upon points not argued by counsel is extremely dangerous. And as an instance in Mr. Hoffman's case, we refer to *Lee v. Huntoon*, page 458. This was a case upon the validity of a mortgage of chattels. By the revised statutes, every such mortgage, unless accompanied by immediate delivery and followed by an actual and continued change of possession of the things mortgaged, shall be deemed to be fraudulent and void, as against the creditors of the mortgagor, and shall be conclusive evidence of fraud, *unless* it be made to appear, that the same was made in good faith and without any intent to defraud such creditors. By an act passed in 1833,

it was enacted, that every such mortgage, not accompanied by immediate delivery and actual and continued change of possession, shall be *void* as against creditors, unless a copy thereof be filed in the town clerk's office, as therein provided, and shall not be valid at the expiration of one year from the date of filing, unless a copy thereof and a statement of the claim of the mortgagee shall be filed in the same office within thirty days previous to the expiration of the year.

In this case, the mortgage was filed, and at the expiration of the year a new mortgage was executed and filed, instead of a copy of the former one. After deciding that there had been a sufficient change of possession to support the mortgage, the vice chancellor proceeds to consider the effect of the act of 1833, and that without necessity, since in his opinion the requirements of the act had been fully complied with. But it is for the purpose of declaring his dissent from the opinion of the supreme court in the case of *Wood v. Lowry*, 17 Wend. 492. That court had said that the statute of 1833 "only adds another ground on which a mortgage of personal chattels shall be void. If the plaintiffs had omitted to file their mortgage, it would for that cause have been absolutely void. If it was before void on another ground, filing it could not render it valid."

Mr. Hoffman says, "adopt the construction of the supreme court and the statute is this: A mortgage must be filed, when, no delivery having been made, it is void; or else it shall be void."

Not so: in such a case, previous to the act of 1833, the mortgage was *presumed* to be void, but its good faith might be established by proof; after that act, it was *absolutely void* and *incapable* of explanation — nothing could cure the defect.

Now, had this matter been discussed by counsel, it is impossible that the distinction should have escaped their

acuteness, and Mr. Hoffman would have avoided a gratuitous conflict with the supreme court, in reference to a point on which their doctrine has been since sanctioned by the court of ultimate appeal.

Strongly contrasted in style with these opinions, are those of vice chancellor Whittlesey. The latter are brief and sparing in the authorities cited. Mr. Clarke's volume contains twice the number of cases in Hoffman's, in about the same number of pages. Many of them, it is true, are upon points of practice, and allowance is to be made for the fact that all the cases in Hoffman are of the unhappy fourth class.

Mr. Clarke in his notes gives the determination of the chancellor upon cases which have been reviewed by him on appeal, and also informs us when any doctrine in the text has been overruled by subsequent decisions of the chancellor. The first instance of this kind we notice is *Hatch v. Eustaphieve*, page 63, where vice chancellor Whittlesey decides, that when the oath of a defendant to his answer is waived, the answer is a mere pleading and need not be signed by the defendant. In *Denison v. Bassford*, 7 Paige, 370, the chancellor held the contrary doctrine. Neither of them allude however to what we deem the true reason for requiring the defendant's signature, that he may be restrained from falsehood by the knowledge that his answer, signed by himself, may be read in evidence against him as a written admission in any suit at law, even where the complainant in the bill is not the plaintiff.<sup>1</sup> Without his signature it is a mere pleading, and of no effect except in the cause in which it is put in.

The case of *Doyle*, page 154, is a rare one — that of an application on the part of the father of an illegitimate female child, praying for the custody of the child, and that the mother might be restrained from interfering with it, on the

<sup>1</sup> 1 Starkie's Evidence, 235 and 288, and cases there cited.

alleged ground of dissolute habits in the mother. The petitioner is living with his wife and family, into which he proposes to introduce the child. The prayer of the petition is denied by the vice chancellor, on the ground, that he can find no authority vested in any tribunal or officer, to save the innocent offspring of guilt from the ruinous consequence of a demoralising education, by giving the custody to the father or the mother, as the welfare of the child may seem to require, either in statute or common law; that such child is at common law *nullius filius*, and there is therefore no father who is bound to support it or can rightfully claim its care or custody.

This seems to us a partial view of the subject, looking as it does only to the *rights* of the father. The ancient and established jurisdiction of chancery, as the guardian of infants, lunatics, &c., is vested in it for the protection of the rights of those who are incapable of protecting themselves. It respects the interests of the *infant*, and when those interests require a change of custody, it transfers the guardianship to any person, parent or not, approved by the court. This doctrine is eloquently vindicated by the lord chancellor in the case of *Wellesley v. Beaufort*,<sup>1</sup> in answer to the argument, that it was only exercised as incidental to the custody of their property. And the case of *Courtois v. Vincent*<sup>2</sup> is an instance where the court appointed a guardian for an *illegitimate* child, and made an order regulating its intercourse with the mother. If the mother be an improper person to bring up the child, then has the father the same right to its custody as any other proper person, and no more.

We cannot omit the characteristic and honorable fact stated by the vice chancellor in this case: "I have been myself to see the child, in the absence of and without the knowledge of her mother." He gathered from that exam-

<sup>1</sup> 3 Condensed English Chancery Cases, 1.

<sup>2</sup> 4 Same, 127.

ination that she loved her mother, and was well educated both in mind and heart. It is not every one who would have the honesty to pursue this course, or the manliness to avow it in print.

But we have no space for a criticism of cases, and must content ourselves with saying in general, that the opinions in Mr. Clarke's volume are clear and well reasoned, with so little of technicality as to be level in most instances to the comprehension of the laity. This is no small merit, and will be appreciated by the profession in New York, who, as we understand, are growing somewhat restive under the ponderous case-learning poured out in Wendell's Reports since the accession of one of the new justices. That vice chancellor Whittlesey should, within the space of two years, have dispatched the current business of his court — cleared the calendar, burdened with the accumulation of years — and this with scarcely the reversal of a decree, is evidence enough of judicial ability as well as industry. The character and importance of that business can be judged of only by an inspection of the reports; but something may be guessed from the remark of senator Verplanck, which we quote for the purpose of commending the entire speech in which it is contained to the attention of our readers.

"If Edward Hyde, lord chancellor, at once the first law officer and prime minister of England, 'by kings protected and to kings allied,'—ay, or lord Somers, with all the glory of the revolution, or Talbot, or Cowper, had for a moment entertained jurisdiction in such causes as Reuben Hyde Walworth takes cognizance of as a matter of course, what an insurrection would it have occasioned in Westminster Hall. The king's bench would have lifted up its voice to the common pleas. The whole corps of judges and sergeants and barristers would have mustered to repel the inroad on the territory of the common law. Articles of impeachment would have been moved in parliament, and

the presumptuous Xerxes of the courts been driven back, ungowned, unwigged, and unchancellorred.”<sup>1</sup>

We exhort the reader of Mr. Clarke's volume not to set down any want of perspicuity to the vice chancellor's style, until he has carefully done what the proof reader should have done. That worthy, in addition to other scandalous errors, seems to have adopted the doctrine, that the punctuation is no part of a statute, and to have extended it to judicial interpretations of the law.

E. P. S.

*Rochester, N. Y.*

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**ART. III.—THE LEGAL AND EQUITABLE RIGHTS OF INDIVIDUAL AND PARTNERSHIP CREDITORS; WITH REFERENCE TO THE TAKING IN EXECUTION OF PARTNERSHIP PROPERTY FOR THE DEBT OF A PARTNER.**

THE ancient doctrine, in courts of law, was, that partners held undivided moieties of the partnership effects; in other words, shares proportioned in number and magnitude to the number of the partners. Thus, if there were only two partners, each owned one half of the partnership effects; if three, one third; if four, one fourth, and so on. So the courts decided, that in executions against a partner for his individual debt, the sheriff might seize and sell a moiety of the partnership effects, but that to levy on such moiety, he must seize the whole effects and deliver back the other moiety to the other partners; and, by the sale, the vendee became tenant in common with those partners. The case of *Heydon v. Heydon*, 1 Salk. 392, decided in the king's

<sup>1</sup> Speech on the amendment of the law and reform of the judiciary system, — advocating the amendments to the constitution now proposed by the legislature.



bench, by chief justice Holt, is an authority in point. "Colman and Heydon were copartners, and a judgment was against Colman, and all the goods, both of Colman and Heydon, were taken in execution. And it was held by Holt, C. J., and the court, that the sheriff must seize all, because the moieties are undivided; for if he seize but a moiety and sell that, the other will have a right to a moiety of that moiety; but he must seize the whole and sell a moiety thereof undivided, and the vendee will be tenant in common with the other partner." So also, in *Jacky v. Butler*, 2 Ld. Raymond, 871. "Two joint partners are in trade. Judgment was entered against one of them. And upon a *feri facias*, all the goods, being undivided, were seized in execution. And upon application to the king's bench, by him against whom the judgment was not, the court held, that the sheriff could not sell more than a moiety; for the property of the other moiety was not affected by the judgment, nor by the execution." And in *Waters v. Taylor*, 2 Vesey and Beames, 301, lord Eldon said: — "According to the old law, I mean before lord Mansfield's time, the sheriff, under an execution against partnership effects, took the undivided share of the debtor, without reference to the partnership account." *Pope v. Haman*, Comb. 217, and *Hankey v. Garret*, 1 Ves. jun. 240, may be cited in proof of the same doctrine.

So late as the year 1818, in the case of *Church v. Knox*, decided in the supreme court of Connecticut, two of the judges held the law to remain as in the cases above named. Justice Hosmer expressed the opinion, in that case, that, *prima facie*, partners were equal owners in the property and debts of a partnership; that if a debt of twelve hundred dollars was due to a partnership consisting of three partners, A., B. and C., in the absence of all proof on the subject, four hundred dollars of the amount could be taken by foreign attachment for the individual debt of A.; and the

learned judge in support of this opinion cited the cases of *Jackey v. Butler*, *Heydon v. Heydon*, *Pope v. Haman*, and *Hankey v. Garret*, already named. In accordance with the same doctrine, is the case of *McCarty v. Emlen*, decided in the supreme court of Pennsylvania, in the year 1797. One question in that case was, can a debt due to a partnership be taken by process of foreign attachment against one of the partners. McKean, chief justice, in delivering his opinion, says: "It must be observed as a general rule, that partnership effects are first to be appropriated to the payment of partnership debts; but this, like every other general rule, admits of exceptions; and it is hardly indeed susceptible of a strict application in any cases but those of bankruptcy, insolvency, and execution. The consequence of its application to partnerships would be highly injurious to trade, and embarrassing to justice. A partner may owe separate debts, and his property may consist of partnership stock; yet, if the objection prevails, it is impossible to conceive when the separate creditors will be able to make that property responsible. While the partnership continues, how shall they compel a disclosure and liquidation of all the debts and credits of the company? And even when a partnership is dissolved, where will separate creditors find the inclination, or the power, to scrutinize and close the records of a long and complicated mercantile connection? But the law is happily otherwise. For it has been repeatedly settled, here as well as in England, that a partner may be sued for separate debts; that the partnership effects may be taken in execution and sold by moieties; and that the purchaser of the moiety under the execution, shall be considered as tenant in common with the partner owning the other moiety. The case in *Douglas*, 650, is, in my judgment, conclusive upon this point." The other justices, with the exception of *Yates*, were of the same opinion. Of the same general purport is the opinion of justice Washington,

in *Gilmore v. The North American Land Company*, 1 Pet. C. C. Rep., 465, decided in 1817. The partnership, in this case, consisted of three individuals. Justice Washington says: "By the purchase of the complainant, under the execution against Robert Morris" (one of the three partners,) "in his separate capacity, the former became, at law, tenant in common in ~~one~~ *undivided third part* of the land which he purchased. The marshal had no power to sell a greater interest than that in the land levied upon, and if a timely application had been made to this court on its law side, it would have so directed. But the purchaser holds the property so purchased, subject to all the rights of the other partners. In equity more especially, he stands in the place of the partner under whom he claims, subject to the partnership accounts."

So in *Lyndon v. Gorham*, 1 Gallison, 367, decided in the circuit court of the United States in Rhode Island, Story, J., remarked: "But I have been pressed with the common case of a separate execution against the tangible partnership property, in which it is said that the *moiety* of the judgment debtor may be sold on the execution. There are certainly decisions which countenance this opinion, and perhaps it may be considered, that at law the sheriff has a right to seize such property in execution."

Chief justice Marshall, in *Harrison v. Sterry*, 5 Cranch, 289, in the supreme court of the United States, in 1809, adds the sanction of his authority and that of the august tribunal over which he presided, to the doctrine of the moieties. Robert Bird was a partner in a mercantile house conducted in London under the name of Bird, Savage, and Bird, and in New York under the name of Robert Bird & Co. Bird, who resided in this country, committed an act of bankruptcy under the then bankrupt law of the United States. Marshall, Ch. J., in delivering the opinion of the court, said: "Robert Bird alone has become a bank-

rupt under the laws of the United States. Consequently, only his private property and his interest in the funds of the company pass to his assignees. This interest is subject to the claim of his copartners, and if upon a settlement of accounts Robert Bird should appear to be the creditor or the debtor of the company, his interest would be proportionably enlarged or diminished. But he is not alleged to be either a creditor or a debtor; and, of consequence, the court consider his interest as being *one undivided third* of the fund. This third goes to his assignees."

On the whole, it seems well established, that anciently partners were regarded in law, as holding the partnership effects by moieties. Each partner's moiety could be taken for his separate debt, without reference to the partnership accounts. To levy on the entire moiety of a partner, it was necessary to seize all the effects, and restore one moiety to the other partner. But such a doctrine, it is obvious, would, in many cases, work great injustice. The other partner and the creditors of the partnership might, by the operation of the legal rule, be deprived of their just rights, unless there were some means of ascertaining and enforcing those rights. Such means existed, in fact, in the beneficent powers of a court of equity. For lord Eldon, in *Waters v. Taylor*, after stating that by the old law the undivided share of the debtor might have been taken, without reference to the partnership account, proceeds, "but a court of equity would have *set that right* by taking the account and ascertaining what the sheriff ought to have sold." And such, it appears from an examination of the cases, beginning at least as early as 1733,<sup>1</sup> was the doctrine and the practice of the courts of equity.

<sup>1</sup> *Croft v. Pike*, 1 P. Wms. 182. — The court of chancery seemed to be of opinion, that such was the equity of the case in *Richardson v. Goodwin*, decided in 1693, 2 Vern. 293. See also *Ex-parte Crowder*, 2 Vern. 706.

But as early as the time of lord Mansfield, the courts of law in England appear to have discarded the ancient doctrine. Instead of holding that a creditor of a partner can take an undivided moiety of the partnership effects for the separate debt of that partner, without regard to the partnership account, they now say, that such creditor can take only the *interest* of that partner in the partnership effects; and that interest is ~~not any~~ share of the effects themselves, but is what would remain to each partner, as his own, after the debts of the partnership shall have been paid, and the mutual accounts of the partners adjusted. It is no longer assumed, that, at law, partners are entitled to undivided shares proportioned to their numbers, but their interest is regarded as altogether uncertain; it may prove to be nothing at all; but whatever it is, it may be taken. When such language first began to be held, we cannot certainly tell. We first find words of similar import in the mouth of lord Mansfield, in *Fox v. Hanbury*, decided in the king's bench, in 1776. In that case, lord Mansfield says: "This leads me to consider what right, in law and justice, one partner has against another, after a dissolution of the partnership. It clearly is not to change the possession, or to make an actual division of specific effects. One partner may be a creditor of the partnership to ten times the value of all the effects. The other partner in that case can only have a right to an account of the partnership, and to the balance due to him, if any, on that account. No person deriving under the partner can be in a better condition. His executor stands exactly in the same light. It is the very text of Lyttleton. In sect. 321, he says, "If there be two tenants in common of a personal chattel, and one dies, the executors shall hold and occupy with the survivor, as their testator did before he died." If a creditor takes out execution against one partner, as in 1 Salk. 392, the vendee would be tenant in common. And in the case of *Skipv v. Harwood*, in chan-

cery, 6th July, 1747, my note says, "If a creditor of one partner takes out execution against the partnership effects, he can only have the undivided share of his debtor; and must take it in the same manner the debtor himself had it, and subject to the rights of the other partner."

This, it must be observed, lord Mansfield lays down as the true doctrine in a *court of law*. Such, taking both law and equity into the account, always ~~was~~ the true doctrine, but it ~~was~~ not always the doctrine of ~~the~~ courts of law. Now, the genius of Mansfield dissolves, as by a single touch, the distinction between law and equity, and attempts to establish at once, though in a rigid soil, the principles of substantial justice. But of what avail to make the legal and the equitable *rule* the same, without also changing the *practice*. Of what avail to say in a court of law, "you can take only the debtor partner's interest," without affording, in the same court, the means of ascertaining that interest?

Accordingly, in *Eddie v. Davidson*, Doug. 650, in the king's bench, 1781, (five years after *Fox v. Hanbury*,) the court assumed the powers of a court of equity, and ordered an account to be taken of the partnership effects. "Davidson was partner with one Birnie, against whom a commission of bankruptcy had issued, but before the bankruptcy, Eddie, a creditor of Davidson, had sued out execution, and levied on the partnership effects. Birnie's assignees obtained a rule to show cause why the sheriff should not pay them a moiety of the money arising from the sale of the goods so taken in execution, upon an affidavit of Birnie that he was entitled to an equal share of partnership effects as partner with Davidson. The plaintiff's *affidavit*, on showing cause, denied that Birnie had an equal share in the partnership effects, and stated that he had embezzled the joint stock to a considerable amount.

"The court directed that it should be referred to the master, to take an account of the share of the partnership effects

to which Birnie was entitled, and that the sheriff should pay a part of the money levied equal to the amount of such share to the assignees." The exercise of such powers had before been known only to the courts of chancery. There is not, it is believed, any other *reported* case in which the king's bench exercised these powers; but that it did repeatedly exercise them, we learn on the authority of serjeants Onslow and Cockell, who say, in their argument in *Chapman v. Koops*, 3 Bos. and Pull. 288, that several cases had arisen in the king's bench where it had been referred to the master to take partnership accounts under circumstances similar to those in *Eddie v. Davidson*. Even lord Kenyon, who, it has been said, acted like a Roman dictator in restoring the ancient doctrines innovated upon by lord Mansfield, compelled the plaintiff in a case tried in the same court, to consent to an account.

The courts of equity regarded this assumption of equity power by the courts of law, with a very unfavorable eye. Lord Eldon repeatedly expressed his opinion of the incompetency of a court of law to take partnership accounts. "How can a court of law," said he, "ascertain what is the interest to be sold, and what are the equities depending upon an account of all the concerns of the partnership for years?"<sup>1</sup>

And Mr. Collyer, in his treatise on the law of partnership, says, that "where the partnership has not been long established, or where the concern is so small that the greater part of its effects have been taken in execution, so that what remains may be easily valued, there seems no sound reason why the accounts under such execution should not be taken at law. On the contrary, where the partnership has been carried on for a series of years, its business branching out in various directions, perhaps to all quarters of the globe, its property and its debts not only increasing in magnitude

<sup>1</sup> *Waters v. Taylor*, 2 Ves. and Bea. 301.

but assuming different shapes, according to the modes in which the former is invested, and the form and circumstances in which the latter are contracted; — there it seems clear that if an execution for a separate debt should occur, of so extensive a nature that the solvent partners are compelled to resist it, they must resort for relief to a court of equity, 'equity having the means of taking the complicated accounts of the partnership, and reducing the concern into that state in which the property would be divisible as clear surplus.'"<sup>1</sup>

But this notion of Mr. Collyer, that whether the account should be taken at law, or in equity, ought to depend on the magnitude and extent of the partnership transactions, seems not to be sanctioned by the authorities. Thus, the court of common pleas in England has expressly decided, that courts of law have not the *legal power* to take such accounts, and that they can be taken in equity alone. In the case of *Parker v. Piston*, 3 Bos. and Puller, 287, [1802] this court refused to enlarge the time of returning a *fi. fa.* until an account could be taken, expressly declaring that there was no ground for their interposition; it was a very plain case at law, and all the difficulties were to be encountered in equity. And in *Chapman v. Koops*, 3 Bos. and Puller, 289, decided in the same court, at the same term, lord Alvanley, Ch. J., expressed his hope that this would be the last application to order an account, that would be made to that court. The proper resort was to a court of equity. Rooke, J., said, "we are not authorized to refer to our officers such matters of account as are the proper subjects of investigation in a court of equity." And Chambre, J., said, "the short objection to this application is, that the court cannot direct a partnership account to be taken, without assuming a jurisdiction that does not belong to it."

<sup>1</sup> Collyer on Partnership, p. 477.



In the United States, we are not aware that there has been any instance, in which a court of law has undertaken to execute the equities between the parties by ordering a partnership account. The uniform tenor of the decisions is, that a court of equity is the proper tribunal to direct such an account. This is recognized as the true doctrine, in several cases decided in the states of New York and Connecticut. It is also recognized by justice Story in *Lyndon v. Gorham*, and by justice Washington in *Gilmore v. The North American Land Company*.

But, on the whole, although a court of law has no authority to ascertain the interest of a partner in partnership effects, yet the legal doctrine that only the *actual* interest of a partner can be taken for his separate debt, and not any undivided moiety, remains as laid down by lord Mansfield. There are indeed, we have seen, a few cases in this country which recognize the ancient law; but in general the cases declare in favor of the more recent doctrine.

It may however be asked, what practical difference is there between the two doctrines? What matters it, whether the law be that you may take an undivided share, or only the actual interest? In the former case, you do not gain an indefeasible title to that undivided share; resort may be had to a court of equity, the actual interest ascertained, and you, divested, it may be, of all your presumptive title. In either case you get only what actually belonged to your debtor. Nor is it to be presumed that an undivided share, to which you cannot give an indefeasible title, can be sold to better advantage than the actual interest. That interest is, in either case, equally uncertain. The seller imparts nothing, (taking both law and equity into the account,) and the buyer receives nothing but that interest. So far as it regards the creditor's seizing the partner's interest or undivided share, we do not perceive that the difference between the two doctrines is material. But their legal consequences are, in at least two respects, different.

First, the seizure of a moiety of partnership effects does not, necessarily and of itself, work a dissolution of the partnership. By seizing a moiety of all the partnership effects, you may, indeed, produce such a result. Still, even in the case of a seizure of a moiety of all those effects, the partnership is not necessarily brought to a close; the effect of the seizure and sale on execution is merely to make the purchaser a tenant in common of those effects with the partner against whom the execution is not. The partners may purchase other effects and continue the partnership in the same manner as before; or if any quantity of effects less than the whole be seized, the partners may go on with their trade in the remaining effects. The legal effect of the seizure is not a dissolution of the partnership, but merely to divest the partnership of the property seized; the other partner and the purchaser of the debtor partner's moiety may trade with it, may sell it, but the proceeds go not into the partnership account. That such a seizure does not, by necessary legal consequence, work a dissolution of the partnership, chief justice M'Kean, in *McCarty v. Emlen*, regards as one of the practical advantages of the doctrine of the moieties. This will readily be seen by referring to the language (before cited) held by the chief justice, in deciding that case. But, on the other hand, the seizure of a partner's interest in a partnership, by stripping that partner, at once, of all he has therein, and substituting his creditor in his place, of necessity and by its own legal force, dissolves that partnership. In the former case, indeed, if resort be had to a court of equity, a dissolution of the partnership will be the consequence. The difference between the two doctrines, then, so far as regards the point in question, is simply this; by seizing the debtor-partner's interest, the partnership is *ipso facto* necessarily dissolved; whereas by seizing a moiety of the effects it is not dissolved by the legal

operation of the seizure, but will be dissolved in consequence thereof, if resort be had to a court of equity.

The other respect, in which the legal consequences of the two doctrines are different, regards the case of a foreign attachment. If it be assumed, that, *prima facie*, each partner owns a moiety of the partnership effects, it follows that in the absence of all evidence relating to that point, a moiety of a debt due to a copartnership may be held at the suit of a creditor of a partner, in a foreign attachment against that partner. And so it was in fact held by justice Hosmer in the before cited case of *Church v. Knox*. Whether equity would rectify any injustice that might arise from such a proceeding at law, has not, to our knowledge, been specifically decided; but by analogy, there can be no doubt that it would.

On the other hand, if we adopt the principle that only a partner's interest in the copartnership can be taken for his separate debt, the creditor must prove what that interest is, before he can hold any part of a debt due to the copartnership, by virtue of a foreign attachment against that partner. Nor can such creditor compel the debtor of the partnership to disclose whether he owes that partner or not; for what means has he of determining any thing in regard to the partnership accounts? Thus, in *Church v. Knox*, it was held by the majority of the court, that the right or interest of one partner in a debt due to the partnership, cannot be taken by process of foreign attachment, to satisfy the debt of an individual partner, without showing from the state of the partnership accounts, as between the partners, and with reference to the solvency of the partnership, what the right or interest claimed amounts to.

The burden of proof, then, if we assume the doctrine of taking the interest only as the true doctrine, rests on the attaching creditor. He must show from the state of the partnership accounts what his debtor's interest in the partner-

ship is; otherwise he cannot hold a debtor of the partnership as trustee of the debtor partner. But, according to the doctrine of the moieties, a debtor of the partnership may be holden as the trustee of a partner, unless it be proved that that partner has actually no interest in the partnership.

But in whatever respects the legal consequences of the two doctrines may differ, and whichever may be the more convenient, or the more equitable, there is no longer any doubt, that, in England, and in most of the United States, where the subject has been made matter of litigation, the rule at law coincides with the rule in equity. The doctrine of the moieties has been exploded, and the creditor of a partner can take only that partner's interest in the partnership effects; and this interest is not any part of the effects themselves, but merely the share which shall be found belonging to that partner upon an adjustment of the partnership accounts. Reduce the partnership effects to a "dry mass of property," ascertain the amount of the partnership debts, then the state of the accounts as between the partners themselves, and the sums which shall be found coming to the respective partners, will be their respective interests. "In law," said lord chief baron Macdonald, *Taylor v. Fields*, 4 Ves. jr. p. 396, "there are three relations; first, if a person chooses for valuable consideration to sell his interest in the partnership trade, for it comes to that; or if his next of kin or executors take it upon his death; or if a creditor takes it in execution, or the assignees under a commission of bankruptcy. The mode makes no difference; but in all these cases, the application takes place, of the rule, that the party coming in right of the partner comes into nothing more than an interest in the partnership, which cannot be tangible, cannot be made available, or be delivered, but under an account between the partnership, and the partner; and it is an item in the account, that enough must be

left for the partnership debts." The same learned judge also observes, "the right of the separate creditor under the execution depends upon the interest each partner has in the joint property. With respect to that, we are of opinion, that the *corpus* of the partnership effects is joint property; and neither partner separately has any thing in that *corpus*; but the interest of each is only his share of what remains after the partnership accounts are taken." The same doctrine, lord Mansfield, as we have seen, lays down as the true doctrine in a court of law; and it has been generally received and acted upon by the courts of law in this country. It is expressly declared by solemn adjudication, to be the law, in New Hampshire, in Connecticut, in Massachusetts, in New York, and perhaps in some other states;<sup>1</sup> in Maryland and in Pennsylvania,<sup>2</sup> there are cases in which it is decided otherwise.

But how shall the debtor's interest be secured by a seizure in execution, and what new relations and rights are created by such seizure? In regard to the first question;—it is obvious, that such interest, while it remains undetermined, and not reduced to money or to something equivalent, is not susceptible of actual specific seizure; it can be specifically seized only in contemplation of law, and not by any corporeal prehension. How then shall the sheriff execute the writ, and how shall that interest be secured from subsequent seizures in favor of other creditors of the same partner? There is no legislative provision, as in the

<sup>1</sup> Tappan v. Blaisdell, 5 N. Hamp. R. 190; Church v. Knox, 2 Conn. R. 514; Brewster v. Hammett, 4 Conn. R. 540; Barber v. Hartford Bank, 9 Conn. R. 407; Witter v. Richards, 10 Conn. R. 37; Johnson v. Sanford, 13 Conn. R. 461; Pierce v. Jackson, 6 Mass. R. 242; Fisk v. Herrick, 6 Mass. R. 271; Smith, *ex parte*, 16 Johns. R. 107; Scrugan v. Carter, 12 Wend. 131.

<sup>2</sup> Wallace v. Patterson, 2 Harris and M'Henry, 463; M'Coombe v. Dunch, in Common Pleas of Philadelphia, 2 Dallas, 73, overruled in M'Carty v. Emlen, Supreme Court of Pennsylvania, 2 Dallas, 277.

case of the seizure of lands, for giving notice of the right acquired by the execution. No legislative enactment points out any mode for holding that interest securely under the execution, until it can be applied in satisfaction thereof. What then can be done? If there be absolutely no mode of taking possession of this interest, if the sheriff makes all the seizure, and takes all the possession which the nature of the thing seized admits of, then is the reason of the law, requiring a taking and holding of possession, satisfied; the suffering the thing seized to remain as before is no evidence of fraud.<sup>1</sup> But is there no mode by which the sheriff can take, though not an actual possession of the interest itself, as such, yet a possession of that wherein it consists, and from which it is to be eventually extracted? Is there no mode of signifying to the world the change of property wrought by the seizure? If there be, and the sheriff neglects to employ it, and suffers the debtor partner to remain in possession of his interest in the same manner as before, it would seem, from analogy, that such neglect and such remaining in possession would be badges of fraud. In regard to this matter, it is clear, that by seizing a partner's interest in execution, the joint tenancy of the partners is dissolved, the sheriff, or after the sale of the interest seized, the vendee, becomes a tenant in common with the other partners in the partnership effects, and as such, is, at law, entitled to the possession of all those effects. At least,

<sup>1</sup> In *Whipple v. Foote*, 2 Johns. R. 418, wheat growing was taken in execution in December, 1805, and in August following, when the crop was ready for harvest, it was cut and carried away. Meanwhile another execution was levied on the wheat; and the question was whether the wheat was holden under the first execution, or not. Thompson, J., held that as the sheriff took all the possession of which the subject matter was susceptible, the case did not come within the operation of the rule that if a creditor seize the goods of his debtor in execution, and suffers them to remain in his hands, the execution is deemed to be fraudulent and void against a subsequent execution.

if the sheriff, or his vendee, should take entire possession of those effects, no action at law could be maintained against him for so doing; for the possession of one tenant in common is the possession of the other. Trespass cannot be maintained against the tenant so taking possession unless he injure or destroy the effects, for each co-tenant is entitled to the possession, and, for the same reason, trover would be equally unavailing.

It is not, however, strictly speaking, the writ that gives authority to the sheriff to take possession of the partnership effects, for that commands him to seize the property of the debtor, and the effects themselves, we have seen, are not his property; the writ confers no authority to seize any thing but the debtor's interest in the partnership, for that alone constitutes his property therein. But the effect of seizing this interest is to substitute the sheriff, and on the sale, the vendee, in the place of the debtor partner, and to invest them with his rights of possession over the partnership effects.

There is, therefore, a practical mode of signifying to the world the alteration of property effected by the seizure, and that mode is a legal one. The sheriff, having seized a partner's interest, may take possession of every article of the effects belonging to the concern, and the other partners can maintain no action at law against him for so doing; not even if it should eventually turn out that the partner whose interest was seized, owed the other partners on account, and that the partnership was insolvent, so that nothing should be found coming to that partner on a settlement of the partnership accounts. That partner, even in that event, would still have a legal interest or property in the partnership, consisting indeed in the mere right to the possession and disposal of the effects thereof, and to a partnership account, but yet a legal interest; so that the sheriff does not, by seizing the same, become liable as a trespasser. It seems,

then, from analogy, that if the sheriff, on seizing a partner's interest, suffers the effects to remain in that partner's possession, the suffering them so to remain is a legal badge of fraud. The effects may be left in possession of the other partners, but must not remain in that of the debtor; the sheriff must take care, either by arrangement with those other partners, or by taking actual possession himself, to exclude the debtor partner from the possession of the partnership effects. On the sale, the vendee becomes entitled to the possession of the effects, and must in like manner, exclude the debtor partner therefrom.

In addition to analogy, we have the authority of judicial decision. In *Skipp v. Harwood*, before cited, Skipp was in partnership with Ralph and James Harwood. Ralph Harwood violated covenants in the partnership articles, and Skipp brought an action against him for the penalty, and recovered judgment. But before execution issued thereon, Harwood confessed judgment to his sisters, who took out execution by *elegit*, and laid hold of the partnership stock which was assigned by the sheriff. The sisters did not, however, take possession absolutely of the effects, but suffered them to remain with the Harwoods. Subsequently, the creditors of Ralph Harwood took out a commission of bankruptcy against him. One question in the case was, whether, by the *elegit*, the sisters acquired a specific lien upon the Harwoods' share in the partnership, and were entitled to their debt against him before any thing would pass to the assignees, or whether they were to be regarded merely as general creditors of Harwood, and to receive a share in common with the other creditors. Lord chancellor Hardwicke, after intimating that the question was material to the sisters, and that the decision of it might be influenced by the opinion of the judges in *Ryall v. Rolle*,<sup>1</sup> then pend-

<sup>1</sup> 1 Atkyns, 165.



ing, proceeds to hold the following language ; " the sisters, on the *elegit*, do not take possession of the goods, but leave them absolutely with the Harwoods. The question therefore arises, whether by this clause, (a clause in the statute of 21 Jac. 1, c. 19,) they are not excluded, being either a plain consent or great laches ; and it holds more strongly against a creditor by execution than any other ; for if a creditor by *fieri facias* seizes the goods of the debtor, and suffers them to remain long in the debtor's hands, and another creditor obtains a subsequent judgment and execution ; it has been determined often, that it is evidence of fraud in the first creditor, and the goods in the hands of the debtor remain liable. As to them, therefore, the point shall remain until the determination of the first question." Observe his lordship here expresses his decided opinion, that the sisters would have lost their interest acquired by the *elegit*, if the same goods had been subsequently levied upon by virtue of an execution in favor of other creditors. The point reserved by his lordship was whether a commission of bankruptcy would have the same effect.<sup>1</sup>

This matter, the mode of executing the writ, may be contemplated in yet another point of view, more satisfactory for practical purposes ; and with reference to certain familiar distinctions between joint-tenancy and tenancy in common. Of tenants in common, it is obvious, each owns a distinct moiety, although he cannot tell which moiety, and he owns it exclusively, his co-tenant having no interest therein. Not so of joint-tenants ; of these, neither is entitled to a distinct and separate moiety, but each is seized of every part and particle of the joint-property. Tenants

<sup>1</sup> This case of *Skipp v. Harwood* was decided in 1749 ; almost thirty years before the case of *Fox v. Hanbury*. The force of it, as an authority in relation to the point in question, is somewhat impaired by the consideration, that the doctrine of the moieties, at that time, prevailed in courts of law, and the sheriff seized the effects themselves, and not the debtor's interest.

in common are seized of the whole of an undivided moiety; joint-tenants of an undivided moiety of the whole.

Thus, under the old law, the sheriff, to levy on a partner's moiety, levied on the whole partnership effects, and then delivered back one moiety to the other partners; for, said the law, partners being joint-tenants, if you levy only on one moiety, the other partner will still retain a moiety of that moiety unaffected by the execution. So you must levy on the whole, and thus sever the joint-tenancy. "The old cases," said lord Eldon, *Dutton v. Morrison*, 17 Ves. 193, "go in this simple course, that the creditor finding a chattel belonging to the two, laid hold of the entirety of it, considering it as belonging to the two, and paying himself by the application of one half, he took no further trouble."

Now, assume the law to be as established by the more recent cases; attach to the debtor's moiety of every part and particle of the partnership stock, a lien for the balance of accounts, in favor of the other partners, and of the partnership creditors. The sheriff, now as before, may levy on the entire moiety of the debtor, by levying on the whole stock, and thus severing the joint-tenancy; but with this difference, that he takes the debtor's moiety, subject to the incumbrance of the partnership account, and this is taking the debtor's interest. And thus the authorities say, in language somewhat loose, that, "in cases of execution it is generally settled, that the whole must be taken in execution and sold, and the purchaser becomes a partner in common with the other partners; the sheriff can only sell the interest of the party, not the effects themselves."<sup>1</sup> Lord Kenyon, in *Smith and others v. Stokes*, 1 East, 363, says, "if indeed property be left in the hands of a bankrupt partner, at the time of the bankruptcy, the assignees are entitled to take possession of the whole, and sell it, but they

<sup>1</sup> *The King v. Sanderson*, 1 Wight. 50.

must account for a moiety to the other partner." And Thompson, chief justice, in *Mersereau v. Norton*, 15 Johns. R. 179, says, "The sheriff, in such cases, seizes all, and not a moiety of the goods sufficient to cover the debt, and sells a moiety thereof undivided, and the vendee becomes tenant in common with the other partner. Although the sheriff sold the oxen as the sole property of Norton, yet no more than his interest passed, and the plaintiff below became tenant in common with the purchaser."

Whether, therefore, we regard the debtor's interest as intangible, or as consisting of an undivided moiety of the effects themselves, subject to the partnership account, it makes no difference; in either case, the sheriff levies on an interest in the entire effects of the partnership.

This view would be quite satisfactory, if partnership effects always consisted entirely of choses in possession. But, in fact, they generally consist also of choses in action. And as to these, the partners are seized, each, of every part and particle, in like manner as of choses in possession. The sheriff, we have said, by levying on the debtor's right in every part and particle of the joint effects, subject to the partnership account, obtains his interest in the partnership; in other words, the clear surplus to which he will be entitled on a settlement of accounts. Does the sheriff, then, contrary to the well-known principle of law, levy on an interest in the choses in action? If so, the debtor has no longer any control over them, he can neither release them nor reduce them to possession; the legal title is transferred out of him, by force of the execution. The courts of law, in adopting the equitable rule, can hardly be supposed to have intended this; the execution, so far as it regards the choses in action, cannot, without doing violence to all notions of legal propriety, affect any thing but the equitable interest, and not even this, *proprio vigore*, but in consequence of its inseparable connection with the partnership

account. The effect of the execution, in respect of its strict legal force, remains incomplete; and it is only in consequence of the subsequent application of the rules of equity, that the creditor can secure to himself any thing from the choses in action. These, certainly, constitute an essential item in the partnership account; and should the debtor, after the levy of an execution on his interest, proceed to release them or to reduce them to possession, would it not afford ground for the interference of equity; since the effect will be to diminish, if not utterly dissipate, that clear surplus, to which the creditor, by virtue of his execution, has become entitled.

We have said that by a seizure of a partner's interest in execution, the sheriff, and on the sale, the vendee, becomes tenant in common with the other partners. This position, though sufficiently correct for general purposes, must not be understood too strictly. The debtor partner does not, by the seizure, lose all property in the partnership; but rather, as in other cases of seizure in execution, the sheriff acquires a special property, while the general property remains in the debtor, and the creditor acquires no property at all, but a mere right to obtain payment of his debt out of the thing seized. So the matter stands, while the thing seized remains in the sheriff's hands. On the sale by the sheriff the relations of the parties are again changed. Now, not only the special property of the sheriff, and the general property of the debtor, are terminated, but the sheriff, by authority of law, transfers the entire property of the debtor to the vendee; the creditor retaining a mere right to receive his debt out of the avails, while nothing remains to the debtor save a right to the surplus. But in no stage of the proceedings has the creditor any property at all in the thing seized.<sup>1</sup>

<sup>1</sup> See the excellent notes of Mr. Metcalf in *Ayer v. Ayden*, Yelverton's Reports, p. 44; where the authorities on this point are cited.

On the seizure, therefore, of a partner's interest in execution, for his separate debt, the sheriff becomes a tenant in common, so far as it regards the special property, with the other partners, while, so far as regards the general property, the debtor partner retains his joint interest until the sale, when the joint tenancy is entirely severed, the property of the sheriff and of the debtor partner terminated, and the vendee becomes a tenant in common with the other partners.

These positions, we are aware, do not accord with the doctrine laid down by Mr. Collyer in his Treatise on the Law of Partnership.<sup>1</sup> "As soon as the goods are taken in execution," says the learned author, "the partnership in the goods so taken, is at an end; and the *creditor* (not the *sheriff*.) becomes tenant in common with the other partner. The sheriff, however, has a special property in the goods, may therefore maintain trespass or trover for them, and may be considered as a legal agent for the sale." The authorities which Mr. Collyer cites to this point are *Chapman v. Kooops*, 3 Bos. & Pull. 289, *Skipp v. Harwood*, 2 Swanst. 587, and *Burton v. Green*, 3 Car. & P. 309; neither of which establishes the position in question. On referring to the case first cited we, indeed, find lord Alvanley saying, that, "by the law of England, the creditor of any one partner may take in execution that partner's interest in all the tangible property of the partnership, and will thereby become a tenant in common with the other partner." But the question, in this case, was not what change of property was wrought by the seizure in execution; it was whether a court of law would stay execution to have an account taken. The spirit of lord Alvanley's remark is, that a creditor of a partner has a legal right to have the interest of his debtor in the partnership property

<sup>1</sup> Collyer on Partnership, p. 274.

seized and appropriated to the payment of his debt. This was all the creditor had done, and his lordship could not, in a court of law, stay him of his legal right. But it was no part of his lordship's object to determine the strict legal relations which existed between the parties in consequence of the seizure.

The learned author is equally unfortunate in his next authority, *Skipp v. Harwood*. Lord Hardwicke, it is true, says, in that case, that "by the seizure of the goods, the jointure between the partners was severed, and the creditors became tenants in common with the other partner." But the point in issue was not whether the creditors or the sheriff became invested with the property of the seizure. The purport of his lordship's remark is, merely, that by the seizure the debtor partner's interest comes into the hands of the law, to be appropriated for the benefit of his creditors, and this he expresses, in general terms, by saying that those creditors [who by the seizure virtually but not legally acquire a property in that interest,] become tenants in common with the other partners. Had his lordship been called to determine the strict legal relations created by the seizure, he would have expressed himself very differently; for in *Lowthal v. Tomkins*, 2 Eq. Ca. Abr. 381, he expressly says, "the property of the goods continues in the defendant until execution executed;" a proposition inconsistent with the doctrine that the creditor of the debtor partner becomes by the seizure tenant in common with the other partners.

The case last above mentioned, *Burton v. Greene*, seems less conducive to Mr. Collyer's purpose than either of the other cases. The opinion of lord Tenterden, as expressed in that case, is simply this: "I am not quite satisfied as to the interest which the sheriff might have sold under the execution. There is great difficulty in making the sheriff a tenant in common with the partners." Is there not quite as much difficulty in making the creditor a tenant in com-

mon as the sheriff? The case suggests, indeed, the idea of difficulty in selling the debtor partner's interest, but intimates nothing on the subject of the legal relations created between the parties by the seizure.

It may be matter of speculation, it can hardly be of practical importance, whether the sheriff can seize, under the execution, any proportional part of the debtor's interest in the partnership effects, as for instance, one third, one fourth, &c., or whether he must seize the whole interest, no matter how great its value.\* In regard to this question, there seems to be no difficulty, in theory, in taking any proportional part of that interest; for why should a creditor be obliged to take an interest of greater value than he judges sufficient to satisfy his debt? But this question can hardly arise in practice, since, owing to the uncertain value of a partner's interest in partnership effects, a creditor can scarcely be deemed to conduct unreasonably or unlawfully, if he seize the whole. It being lawful to seize the whole, it is also expedient; otherwise some other creditor may seize another part, and thus the number of parties entitled to the possession of those effects be increased, and the adjustment of the partnership concerns rendered more embarrassing.

The proceedings at law being terminated, it only remains to show what further proceedings may be had in equity.

The parties now interested in the partnership effects are :

First, The sheriff, who has a special property in them ;

Second, The debtor partner, in whom the general property remains ;

Third, The creditor of that partner, who, seizing that partner's interest, has a right to obtain payment of his debt out of the same ;

Fourth, The other partners, who are tenants in common with the sheriff and debtor partner ;

Fifth, The creditors of the partnership, who have an equitable lien on the partnership effects, prior to the lien

acquired by the attachment or execution levied by the creditor of the partner ;

And, sixth, to these may be added other creditors of the debtor partner, in case any such creditors should levy on the same interest.

On the sale by the sheriff, the general property of the debtor partner and the special property of the sheriff cease, both being now transferred to the vendee ; and nothing remains to the creditor but a right to satisfaction of his debt, and nothing to the debtor partner but a right to the overplus, if any there be. Such are the parties, and such their mutual relations.

The hardships produced by the operation of the rules of law, which call for the interference of equity, may be enumerated as follows, viz :

1. The creditors of the partnership, in consequence of the sheriff or his vendee retaining possession of the partnership effects, may be unable to obtain payment of their debts.

2. The other partners, who possess the right to have the partnership effects applied to partnership purposes, may be prevented from the exercise of that right.

3. The debtor partner may suffer great loss from the sale of his interest under the execution at law, on account of the uncertain value of that interest.

4. The creditor of the debtor partner may, for the same reason, be unable to obtain the actual value of that interest, to be applied in satisfaction of his claim.

5. Other creditors of the same partner, who may have laid attachments on that interest, subject to the rights acquired by the first attaching creditor, may, for the like reason, obtain nothing from that interest.

6. The vendee of the sheriff may be unable to derive any actual benefit from his purchase.

These hardships, it will be observed, are of a two-fold nature, consisting, first, in a diversion of the property, to



some extent, from its equitable destination, and second, in a sacrifice of the interests of some of the parties, owing to their uncertain value. The law has placed these different parties in such a condition that each has an interest in the partnership effects, but knows not what it is, and cannot render it available to his purposes; and, besides, some of the parties are exposed to the danger of having their interests well nigh sacrificed from the rigid operation of legal rules. Equity alone has the power of ascertaining the exact interests of all, of protecting those interests from injury, and, finally, of awarding and enforcing sentence according to substantial justice. The judges of the courts of law, while (with the exception of lord Mansfield, and perhaps of lord Kenyon,) they declare themselves invested with no such power, uniformly ascribe it to a court of equity.

But in what manner does equity exercise this power? What is the form of proceeding? Why, obviously, the suffering party prefers his bill, stating his rights, the injury which he suffers or anticipates, prays that his right may be ascertained by the court, protected meanwhile, and finally awarded to him by a formal decree. In technical language, he prays for an account, an injunction, a receiver, and a final distribution.

That, on the seizure of a partner's interest for his separate debt, an account may be taken in equity, is clear, upon principle, and abundantly established by authority.<sup>1</sup> The

<sup>1</sup> Edén on injunctions, first American edition, page 24; *Taylor v. Fields*, 4 Ves. 396; Maddock's chancery, page 78. Mr. Maddock says, "As between one partner and the separate creditors of the other, the separate creditors cannot affect the stock any further than the partner could whose creditors they are, and if they proceed against the partnership property, the partners may file a bill to be quieted in the possession of the partnership effects, and pray for an account of what is due to the partner so giving a security, and for an injunction in the mean time." Lord Eldon, in *Waters v. Taylor*, 2 Ves. and Bea. 301, and in the matter of *Wait*, 1 Jacob and Walker's Ch. Rep. 585, distinctly declares the same doctrine. In *Bevan v. Lewis*, 1 Sim. 376, an ac-

authorities do not specifically say who may prefer a bill for an account. The plaintiffs, in the reported cases, have generally been the solvent partners. But that any of the parties in interest, entitled to a share in the partnership effects, may prefer such a bill, can hardly be doubted.

In order to take an account, the partnership effects must be converted into a "dry mass of property," since on the ascertained value of those effects, the actual interests of the different parties depend. They can be so converted only by collecting the debts and selling the partnership property. Such collection and sale can be enforced only by an order of court, executed by a *receiver*, appointed for that purpose. The master, on receiving the report of the receiver, will be able to take the account, and report to the court, where a final adjustment of all the interests can then be made.

If there be just grounds to apprehend that, meanwhile, the partnership effects will be improperly disposed of, or injured, an injunction may be obtained; otherwise the very object of preferring a bill for an account may be defeated.

Whether the proceedings at law of the partner's creditor, under his execution can be restrained by injunction, is a different question. All the sheriff can do by virtue of this execution is, according to the modern doctrine, to seize and sell the partner's interest. There seems, therefore, to be no reason why an injunction should be granted against him, except in favor of the debtor, or of other creditors of his levying subsequently, whose interests may be sacrificed by a sale, while their value remains undetermined. In *Moody v. Payne*, 2 Johns. Ch. R. 548, this question arose. The chancellor, in delivering his opinion, remarked as follows:

"It is true, the execution at law only takes the interest of the partner who is sued, subject to the partnership debts;

count was ordered and a receiver appointed. See also *Chapman v. Koops*, 3 Bos. and Pull. 289; *Wilson & Gibbs v. Conine*, 2 Johns. Rep. 230.

and there are difficulties in selling such an uncertain interest, before it is ascertained by taking and stating the accounts in this court, what is the interest to be sold. Lord Eldon, in *Waters v. Taylor*, 2 Vesey and Beame, 301, felt the weight of that difficulty, but still he seemed to admit, that a court of law might in the mean time go on and sell, and that this was the constant practice. I do not know that this court has ever undertaken to stop an execution at law, in such a case, until the partnership accounts have been taken, and it would be too much for me to assume it without precedent. The principle would go to stay executions at law, in every case, against the partnership property of one partner, who owed separate debts, until the disclosure and liquidation of the concerns of the copartnership. This would produce inconceivable delay and embarrassment, in respect to the separate creditors. If those creditors can sell only subject to the joint creditors, there is no harm in suffering them to go on at law; and if any sacrifice of the interest of the separate partner is made by reason of the uncertainty, it affects only that partner, who does not here raise the objection. The late exchequer case of the *King v. Sanderson*, 1 Wightwick, Ex. Rep. 50, admitted, that upon an extent against one partner, the crown, like a separate private creditor, took the separate interest of the partner subject to the partnership debts; and that it was the practice for subjects to issue executions against the interest of one partner, and that the sheriff sold only the interest of such partner, and not the effects themselves. The cases referred to by Mr. Maddock<sup>1</sup> do not warrant his conclusion that chancery stops such executions by injunction. It is evident that the courts of law are in the constant practice

<sup>1</sup> Maddock's Ch. R. 112; *Taylor v. Fields*, 4 Ves. 396; *Barker v. Goodair*, 11 Ves. 85; *Dutton v. Morrison*, 17 Ves. 209, are the cases to which Mr. Maddock refers.

of awarding execution in such cases; and that this court does not ordinarily, and upon such general grounds, enjoin the sale at law."

But suppose the debtor partner "*does* raise the objection" to the sale of his interest, while its value remains undetermined; will chancery, in that case, interfere by injunction? The chancellor, in the opinion just cited, seems to intimate that there would be ground for such interference. Certainly, the rigid operation of the rules of law exposes this partner to a hardship, from which he can obtain no relief but in equity. In equity, his interest can be protected, and justice be done to all parties. Indeed, it is not incompatible with the rights of the creditor that his execution at law should be staid, until the value of the interest seized can be ascertained, but subservient rather to his more complete enjoyment of those rights. While that interest remains uncertain, the creditor will hardly be able to obtain its *actual value*, to be applied in satisfaction of his debt; but once determined, he will have the whole, or such part as is sufficient, and the debtor, the overplus. This is just, both as it respects the creditor and the debtor; this is what equity requires. The debtor suffers no loss, and the creditor obtains the full value of all that was his. One of the greatest difficulties, in the way of the creditor's rendering his debtor's interest in the partnership available to his purpose, consists in this very thing, that when that interest is seized it cannot be sold, (except at the greatest hazard to all concerned therein,) on account of its uncertain value; a difficulty to be obviated only by the creditor's purchasing the interest himself, or by his procuring some one to act as purchaser, in his place, and for his benefit. And even then, perhaps, resort must be had to a court of equity, and the whole matter be finally adjusted there.

Upon principle, therefore, it would seem that the sale at law should be staid, on application being made to a court

of equity, in behalf of the debtor or of other attaching creditors.

Thus, by means of *injunction* and *account*, equity preserves the interest seized from being sacrificed, ascertains what it is, and finally disposes of it as well as of the whole partnership property, according to its just destination.

We have thus exhibited the ancient and modern doctrines of the courts of law, their practical difference in certain essential respects, the mode of executing the writ, the parties in interest after the seizure, their mutual relations, the hardships resulting from the legal rules, and the relief which equity has power to afford; without, however, pretending to solve all practical difficulties, but rather with a view of developing *the principle* to be adopted as a guide in attempting their solution.

These difficulties, it will have been observed, flow, chiefly, from the introduction of the equitable doctrine into the courts of law. Transplanted here, it seems an exotic in an uncongenial clime. The old rule of the *moieties*, though it wrought injustice, was yet intelligible in itself, easily reduced to practice, and perfectly consistent with other legal rules. And when you came into equity, and found there the doctrine of the *interest*, that too as a principle of equity, was plain, practicable, and in perfect harmony with all parts of the system to which it belonged. The two departments were kept distinct. Law maintained her rigor, while equity, with more pliant hand, dispensed to all, without injury to any, their respective rights.

But, as the law, beginning to feel the impulses which the advancing commerce of the English nation was fitted to inspire, adopted the more commercial principle of the equity courts, it seemed not to foresee all the legal consequences that would thence result, nor to perceive its own inability to give it entire effect.

By contemplating the difficulties of the subject in their

origin, we may come to apprehend their true nature, and, as varying exigencies arise, so temper law with equity, as to produce, from their blended operation, a result as nearly just as possible.

F. F.

Hartford, Conn.

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ART. IV.—ON THE DIVISION OF ESTATES, AND THE INFLUENCE WHICH IT EXERCISES ON THE DISTRIBUTION OF PROPERTY.

[Translated from an article by Mr. Hippolite Passy, in the *Revue de Législation et de Jurisprudence*, for April and May, 1841.]

THE effect produced by the laws of succession, which prevail in France, is a question frequently controverted. In the opinion of some persons, these laws tend to favor, in too great a degree, an equal distribution of property. To all who stand in the same degree of relationship, they give rise to equal rights. Every estate is divisible into as many lots as the deceased proprietor leaves children or collaterals; and, as a new dismemberment of patrimonies takes place with each new generation, a gradual diminution of individual fortunes must necessarily keep pace with this progressive parcelling out of properties. Are these assertions well founded? Is it true, that the divisions of estates among heirs tend to bring down all to a common level? What have been their results thus far? These questions, which are important in more than one point of view, deserve an attentive examination.

And, in the outset, it is worthy of remark, that, notwithstanding the diversity of legislative systems which have been applied to hereditary transmissions, there is no country in which property is not very unequally diffused. Among

the nations of antiquity, in which the masses of the population were in a state of slavery, the greater number of law-givers vainly attempted to introduce an equality of condition as to property ; the absence of which, by fomenting all manner of public and private corruption, precipitated the ruin of states ; their injunctions the most rigorous, and their combinations the most complicated, have alike failed to accomplish the end ; and even the institutions of Lycurgus were not slow to yield and give way before the power inherent in the natural causes of inequality. •

In the modern world, the systems of succession not only differ according to different countries, but also in many countries, according to the different classes of society ; and, yet their effect, at least as to the disproportion of fortunes, has been in fact the same. Thus, while the right of primogeniture and the law of entail contributed more and more to concentrate, in the hands of the nobility of feudal Europe, the domains of which they had the exclusive property, the usage of hereditary divisions did not prevent the rest of the population from becoming divided into rich and poor. And, further, in proportion as the sources of wealth were enlarged and multiplied by the progress of labor, the principle of inequality extended itself into the ranks of the lower classes ; and families arose among them, whose growing opulence acquired a degree of elevation, which enabled them to rival in luxury, and sometimes in importance, all that was looked upon in society as the greatest and most illustrious.

Such was the case in those cities of Italy, where certain plebeian families, after having amassed immense riches, formed themselves into sovereign aristocracies, without renouncing the usage, deeply rooted in the manners of the people, of dividing successions among the children of the deceased proprietors. In the same manner, all possible differences of fortune manifested themselves in the cities of

Germany, of Flanders, and of Holland, and in the cantons of Switzerland. No where did the principle of division prevent the accumulation or duration of estates; and every where did the differences in individual wealth correspond to the degree in which institutions and territorial situations were more or less favorable to the development of the industrial arts, and of mercantile activity.

There are still in Europe vast countries, which have never acknowledged any other principle of succession than the allodial; and, in which, consequently, the experiment of hereditary divisions has been going on for a long series of ages and generations: we refer to the nations of Slavonian origin. In these countries, the possession of lands was, in fact, exclusively reserved to the nobility; but, as the sole restriction upon the equality of the rights attributed to the children of the same parents, in the matter of inheritance, consisted in the custom of allowing the daughters only the fourth part in value of the immovables belonging to the paternal succession, every thing seemed to tend the more to the establishment of an equality of fortunes, that the despised exercise of the industrial professions did not offer to the members of the privileged class any means of changing their respective positions. But the result was far otherwise. In no country has the inequality of wealth become more excessive, than among the nobles of Poland and Russia. In Poland, especially, where the nobility were very numerous, and where five domains only had been entailed, some houses acquired a royal opulence, and the greater part of the others fell into complete indigence. There are still reckoned, at the present day, one hundred and fifty thousand nobles in the ancient provinces of Podolia and Volhynia; and almost the entire territory of those countries is concentrated in the hands of not more than fifty families.

Such constancy and uniformity, in the facts realized at all epochs, and under the dominion of circumstances the



most diverse, suffice to show, that if the laws of succession are capable of exercising an influence upon the distribution of fortunes, they have no power whatever to restrain accumulation, or to confine individual properties within uniform limits; and, in fact, inequality of property is too essential an element in the well-being of humanity, to be abandoned to the chance of social conventions; it is created and maintained by the constant coöperation of causes, the activity of which it is not in the power of legislative provisions to destroy.

Among those causes which act with the most power, there are some which are so simple and so visible, that they have never escaped observation, and which it is sufficient merely to indicate. Such are, among others, the inequality in the number of births to a marriage, and the difference of individual propensities and faculties. It was said by Aristotle, more than two thousand years ago, that the Greek lawgivers, before wasting their strength in combinations destined to maintain an equilibrium of property, might have better devoted themselves to the inquiry whether there existed any means of rendering unions equally fruitful. In this respect, there can have been no change; and, in every age, the impossibility, that all fathers should have and should leave the same number of heirs, is sufficient to create sensible differences of condition and of fortune.

Dissimilarity of taste, of inclination, and of capacity, are not less influential. Men are not born equal in powers and dispositions, and the qualities which lead to fortune are not diffused among them in the same degree. In every career of life, the most active, the most intelligent, and the most sagacious prevail over their competitors; and their exertions, more obstinate, or better directed, obtain more ample recompense. It is providence itself, which, by endowing them with superior faculties, has determined that they should occupy the first places; and, therefore, in elevating

themselves above the multitude, they do but obey their natural vocation.

But if these causes operate alike through all the degrees of the social scale; if they diffuse inequality in the most humble as well as in the most elevated ranks; there are others which seem specially destined to assure to the opulent classes the advantages of which they are already in possession. These causes are the superior intelligence resulting from a more careful and complete education; the facilities of further accumulation afforded by fortunes of a certain size; and the difference in fruitfulness of marriages, according to the classes in which they are contracted.

Of all the advantages possessed by the rich classes, the greatest is that intellectual superiority, which they owe to the benefits of an instruction, which is denied to the rest of the population. Those employments, functions, and professions, which, as they demand a degree of knowledge acquirable only by long and expensive study, are always the most liberally rewarded, seem to belong naturally to persons who have been brought up in their ranks. In all affairs, and in all careers, the intelligence and habits of reflection, for which they are indebted to the serious studies of their youth, come to their aid, and assure them of numerous means of success; and, hence, those sources of opulence to which they alone resort, and the current of which is continually increasing, and receiving the wealth already transmitted to them by the past.

The power of extension, inherent in acquired wealth, does not operate less to keep up disparities of existing situations. On the one hand, the revenues enjoyed by the rich enable them to accumulate by saving; and, on the other, they possess advantages in the way of business, by reason of their greater resources. Gain the first million, and the others will come of themselves. This old commercial saying is full of truth. In proportion to the capital required

for any operation or speculation, the less accessible will it be to the great mass; and the less there is of competition in any business, the more lucrative will it be. It is this, above all, which enables great capitalists to realize important advantages. They alone have the power of acting upon great masses of values; they alone are able to accomplish remote results, and to bring long periods of time into their calculations; they alone have the means of acquiring manufactories and establishments, whose value is so great as to prevent the price of them from ever rising to the point corresponding to the revenue which they produce. In truth, when we look at the facilities of gain and of accumulation possessed exclusively by the rich, we readily perceive that the ostentatious tastes and inordinate desires, so frequently generated in their minds by the satiety of enjoyment, the vanity of rank, and the wearisomeness of idleness, are wisely adapted, and not more than adequate, to preserve society from those abuses, which are inseparably connected with the excessive concentration of wealth.

To the causes of inequality abovementioned must be added another, the influence of which among us is great, namely: the difference of fruitfulness of marriages in the different classes of society.

It would be natural, certainly, to take it for granted, that the multiplication of children would be favored by increased facilities for their nurture and education. But the fact is not so. Whether it be owing to the fear of embarrassment connected with their establishment in life, to an unwillingness to have them fall from the position in which they are born, or to whatever cause it may be due, it is uniformly true, that the rich families, taken in the mass, are those in which there are fewest children; and that their ranks would become thinned from generation to generation, if the gaps in them were not constantly filled by new families, who are called to the vacant places by their recent acquisition of the distinctions of wealth.

There is something in this assertion, so opposed to the commonly received notions, that it requires to be supported by the most unexceptionable proofs. These proofs are to be found in the facts of statistics and history.

Population, as is well known, is distributed into groups, composed of dissimilar materials. In cities, and especially in great cities, we find the greatest proportion of rich families; and if it be true, that these families have in general fewer children than others, it is impossible that their presence, in the places in which they reside in the greatest numbers, should not be perceptibly manifested in the whole number of births. And such is the fact. Throughout the whole of Europe, marriages are ordinarily less fruitful in great than in small cities, and less fruitful in small cities than in the country. In regard to France, the following facts may be regarded as established by actual documents.

The average number of legitimate children, born in each year, from 1826 to 1836, was 904,702; and as the annual average of marriages, during the same period, was 256,927, it follows, that the number of births to each marriage was a little more than 3.52.

If we take now the important cities, those containing more than 20,000 souls, of which there are 39, we shall find that they include a total population of 2,634,532 inhabitants, and that during the period above mentioned, from 1826 to 1836, the number of births in them on an average, was 65,290 each year, and the number of marriages 21,374, or 3.05 births to each marriage. In these cities, therefore, the number of births to a marriage is less by 0.47 than the general average of the country, and less by 0.51, or nearly 15 per cent., than the average of the country and cities of less than 20,000 souls taken together.

There is no doubt, that the less fruitfulness of marriage in the cities of more than 20,000 souls is owing to the greater number of rich families which their population con-

tains; for these cities do not all of them present the same results, and the number of births to a marriage differs in an especial manner, according to the peculiar character of their population. Of this we shall be satisfied, by comparing the facts as they exist in those cities, in which we find the most marked disparities.

*Cities of more than twenty thousand souls, in which marriages are the least fruitful.*

Cities.	Births to a marriage.
Le Mans,	2.45
Tours,	2.51
Versailles,	2.58
Angers,	2.62
Caen,	2.66
Clermont-Ferrand,	2.74

*Cities of more than twenty thousand souls, in which marriages are the most fruitful.*

Cities.	Births to a marriage.
Saint Etienne,	4.56
Nimes,	4.02
Boulogne,	3.98
Marseilles,	3.82
Dunkirk,	3.76
Limoges,	3.75

We see, therefore, that while those cities, in which the number of births is the least, are principally peopled by respectable citizens living upon their revenues, those, on the contrary, in which the number of births is greatest, are manufacturing or maritime cities, in which the laboring population is very considerable. It may be remarked, also, that in these last, the annual number of births considerably exceeds not only the average of the cities of more than 20,000 inhabitants, but even the general average of all France.

As considerable inequalities exist in the number of births to a marriage, in the different parts of France, it will be worth while, in order to remove all doubt, to compare together cities situated in the same neighborhood, but possessing neither the same industry nor the same kind of population. For this purpose, we shall compare certain manufacturing or maritime cities, with other cities belonging to the same departments, but containing only a small number of the laboring population.

<i>Manufacturing or maritime cities.</i>		<i>Other cities.</i>	
Births to a marriage.		Births to a marriage.	
Saint Quentin,	4.09	Laon,	3.01
Carcassonne,	3.89	Narbonne,	3.14
Vire,	3.33	Caen,	2.66
Aubusson,	3.01	Guéret,	2.67
Louviers,	3.53	Evreux,	2.53
Marseilles,	3.82	Aix,	3.06
Lodève,	4.79	Montpellier,	3.69
Saint Etienne,	4.56	Montbrisson,	3.07
Reims,	3.41	Châlons-sur-Marne,	3.15
Laval,	3.20	Château-Gonthier,	2.20
Sedan,	4.11	Mézières,	3.30
Romorantin,	3.26	Blois,	2.66
Corbeille et Essonne,	3.51	Versailles,	2.58

The disproportion between these different averages is very considerable, since, in some cities, it amounts to more than forty per cent; and, besides, it is to be observed, that, with the exception of Marseilles, Aubusson, and Laval, the maritime or manufacturing cities have all of them more births to a marriage than the departments to which they belong. The differences in this respect are great, and extend from 1.30 to 0.20.

It is to be regretted, however, that the statistics of France, published in 1837, by the minister of commerce, are confined to giving the details of the population in cities which are the chief places of their several districts. Information is wanting in regard to some very important manufacturing cities, such as Mulhouse, Elbeuf, Turcoing, and Roubaix; but there is no reason to doubt, that the facts concerning them would fully agree with those which it is in our power to state.

The restrictive influence of wealth on the fruitfulness of marriages is no where manifested more clearly than in the city of Paris. Here are collected together the most opulent families of the whole kingdom; and as they inhabit certain parts of the city, in preference to others, the facts in rela-

tion to them have something more complete and more salient than we observe any where else. Now, in Paris, as we learn from the inquiries prosecuted under the auspices of the count de Chabrol, the number of births to a marriage in the different wards increases regularly in the inverse ratio of the degree of ease and wealth enjoyed by the local population. The following table exhibits the actual state of things, according to the average presented by the five years preceding 1837. For the sake of greater clearness, the wards are arranged in the order of their respective fruitfulness, beginning with the lowest number.

Wards.	Births to a marriage.	Wards.	Births to a marriage.
2.	1.87	9.	2.39
10.	1.94	7.	2.57
3.	2.00	6.	2.59
1.	2.08	8.	2.72
11.	2.12	5.	2.89
4.	2.38	12.	3.24

These figures are decisive, at least in regard to France. In Paris, the greater the wealth of the population, the fewer is the number of births resulting from the marriages which they contract. Taking together the four wards which stand at the head of the table, and which include the wealthiest families, we find only 1.97 births to a marriage; the four wards in which the poorest part of the population resides, on the contrary, show 2.86; and, between the two wards placed at the extremes of the scale, the second and the twelfth, the difference is from 1.87 to 3.24, or more than 73 per cent. These facts deserve the more attention, that, notwithstanding the causes which induce the inhabitants of Paris to group themselves according to their respective situations, there are some poor families in the wards inhabited by the rich, and some rich families in those which are inhabited by the poorer classes; a circumstance, which ought necessarily to diminish the differences above stated, if it

were possible to separate completely the different classes of the population, according to their respective fortunes.

A consideration of great importance is, the evident fact, that the richest part of the population of Paris, that which resides in the second, tenth, third, and first wards, would not maintain itself at its actual number, if it were not constantly recruited by families whose wealth is of recent acquisition. Not only are the children destined to keep up these families less numerous than their parents; but as a deduction must also be made of those who die at an early age, and of those who do not marry, (and this is the case with one fourth, at least, in a city in which thirteen out of twenty-nine children die before attaining the age of twenty-one,) it follows, that three generations, or the period of a century, would be sufficient to reduce these families by more than one half. Surely, a population, which decreases with such rapidity, does not run any risk of being impoverished by a division of estates. So far from this, the extinctions, which take place in its ranks, must inevitably lead to a still greater accumulation of wealth.

In the investigations, of which the facts just stated are the results, we have made no account of illegitimate children, though the number of such is so considerable, that for the last thirty years, it has amounted to one-sixteenth of the whole number of births. Two very obvious reasons have led to this course. In the first place, there are very few natural children who are acknowledged and called to participate in successions; and, secondly, these children are almost all of them born in the poorer classes, and their number is only another proof of the greater fruitfulness of those classes.

As to marriages, the number of which necessarily influences the development of the population, the number of those which take place in the cities of more than twenty thousand souls, and in the rest of the country, is precisely



the same. In the one, as in the other, the number is estimated at one marriage to a hundred and thirty-nine persons; but, as in France, there are many cities which understate the real amount of their population, at the time of a new enumeration, it cannot admit of doubt, that the city population is more considerable than the official returns indicate, and, consequently, that the real number of marriages falls short of one in a hundred and thirty-one.<sup>1</sup>

If the facts above stated indicate that in general the wealthy classes multiply much less than the rest of the population, the same conclusion is also justified by history; and the teachings with which the latter furnishes us on this point are of such a nature, that it seems reasonable to regard them as pointing to the accomplishment of one of those natural laws, the influence of which, manifested in all ages, has only been restrained in some countries, for short periods, and by way of exception.

In fact, from the most remote periods, the successive disappearance of a great number of families, who had been elevated to the first rank by political or religious preëminence, has always been a matter of astonishment to the people. In ancient Greece, the old noble races of Corinth and Athens were very soon extinguished; and, at Sparta, the ruling families, among whom the territory of Laconia had been divided, gradually diminished in number, so that in a few centuries not more than seven of them were left. In the same manner, at Rome, the *gentes* forming the patriciate did not keep their numbers good; and the successive admissions into their ranks from the most illustrious plebeian houses, did not prevent the families of which they were composed from being more and more reduced.

<sup>1</sup> It would be desirable to compare the differences of births and marriages, in the different classes of the population in other countries; but the official statements published in England, in Belgium, and in some other parts of Europe, give the numbers only by provinces, and do not furnish any available results.

More modern times present us with many similar examples. Throughout Europe, a great number of names, and a still greater number of historic families, have disappeared. If the lesser nobility has preserved itself in greater number, the fact must be attributed in part to the progressive multiplication of letters of nobility; and, in part, to the very poverty in which multitudes of simple gentlemen live in some provinces, and which leaves them strangers to those habits of circumspection, that govern opulent families. It is certain, however, at any rate, that in those countries where titles have ceased to be an object of ambition, the nobility has constantly diminished in number. Holland, for example, has very few remaining, and there is one province even, that of Zealand, in which there no longer exists a single one of the families anciently inscribed on the registers of the equestrian order.

And what has been the fate, also, of the greater part of the houses composing the aristocracies that once governed the republics of Switzerland and Italy? In Venice, we hardly find a descendant of those who figured in the book of gold, at the time of its establishment. In Berne, at the close of the last century, one half of the noble families of her founders had become extinct, and a great part of those, who, since the middle of the sixteenth century, had succeeded in perpetuating themselves in her councils, had disappeared.

The vicissitudes of political life have doubtless contributed to diminish the number of historic families; but as those whose existence has not been exposed to the storm, are for the most part extinct, there can be no doubt, that a considerable share in the change they have undergone is attributable to ideas and feelings, which rarely fail to accompany superiority of wealth and position. If the most opulent population of Paris, that population which does not furnish two children to a marriage, should cease to be kept

up and renewed by families newly enriched, it would quickly decline, and the progress of extinction in its ranks would be still more rapid than in any of the aristocratic bodies of which history has preserved the recollection.

Every thing, therefore, attests the fact, that numerous and diverse causes concur in maintaining an unequal diffusion of wealth; and, among these causes, an important one is the diminished fruitfulness of marriages contracted in the higher ranks of society. In fact, it is not only true, that the small number of children in rich families leaves them fewer heirs than estates; but the greater number of children in the poorer classes is itself an obstacle to their acquisition of those resources, which are necessary to enable them to share in the benefits of property.

But if every thing, in the social order, is opposed to an equalization of fortune, is it not the effect of successive divisions to cause the ancient inequalities of wealth gradually to disappear? Do they not tend to assimilate private situations, and to diminish, little by little, the distances which separate the diverse parts of the population? These questions can only be answered by an appeal to facts, which we shall now proceed to interrogate, by endeavoring to appreciate the nature of the movement, which has taken place among us in the distribution of wealth.

Hitherto, the opinion that wealth scatters itself, and issues from the hands which possessed it, to be disseminated in the mass of the population, has been rested on an incontestable fact, namely, the progressive multiplication of territorial divisions. At this moment, the number of separate tracts in France is computed at 123,638,328; and the conclusion is drawn that such a division of the land would not have taken place, without a corresponding increase in the number of the rural proprietors. But this is a great error. The parcelling out of the soil has, in fact, nothing whatever to do with the quality or magnitude of individual fortunes;

and territorial parcels may be multiplied without either removing wealth altogether, or even subdividing it into smaller and more numerous portions.

What are the causes of this minute parcelling of lands? Two, namely, alienations and divisions among heirs. Alienations, whatever changes they may induce in the forms and dimensions of properties, have no influence upon the diffusion of wealth. The seller, who divides his property in order to enhance the price, does ~~not~~ by so doing receive less than the whole value of each of the parcels which he cedes to others; the buyer, on his part, pays with capital of which he was already in possession; and, in all this, there is nothing more than an exchange, which does not alter the anterior situation of the parties, but, which, by permitting each of them to put his fortune into a form the best adapted to his interest, or his taste, is equally profitable to all.

In a great part of France, it is true, the rural classes are gradually acquiring the lands; and, for the small parcels which they buy from time to time, they pay a price which tends to multiply sales in detail. But this fact, which proves that the rural classes are thriving, and that land is really the best kind of investment for those who cultivate the soil themselves, imparts no prejudice to any person whatever. Proprietors, who desire a revenue greater than what they can obtain from their domains, have nothing to complain of in a movement, which increases their marketable value, and which permits them to exchange their estates for other kinds of property, on advantageous terms. In this point of view, the progress of accumulation among the cultivators is eminently favorable to them.

In regard to divisions among heirs, they contribute greatly to parcelling the soil. Many co-heirs, instead of selling the property which falls to them in a mass, and dividing the

price, prefer to divide the estate into lots, and each one keep his own.

But these operations do not act upon individual fortunes, in any other manner than according to the proportion which is established between the number of heirs and the number of estates; and, if there are successions which create new proprietors, there are also successions which merely enrich the old ones, and which multiply the parcels of land at the same time that they diminish the number of the proprietors.

There is nothing, therefore, in the movement of the parcels, which can give us any light concerning the changes which have taken place in the distribution of territorial wealth; we must consult another fact, namely, the progress of landed estates. It is not, however, that the number of landed estates indicates exactly the number of proprietors. Far from it. Landed estates represent only the union of the several parcels belonging to the same tax payers within each collection district; and, as many persons have property in different districts, it follows, that the number of landed estates necessarily exceeds that of proprietors. This fact, however, does not invalidate the conclusions to be drawn from the changes affected in the number of estates: for the causes, which create more estates than there are proprietors, having acted in the same manner at all periods, it is certain, that every change in their several amounts is a proof of an analogous change in the distribution of territorial property. Now, what has been the progress of landed estates, according to the known official returns?

In 1815, the number of landed estates was 10,083,751; and, in 1835, there were 10,893,528. This shows an increase, in twenty years, of eight per cent, which necessarily extends to the number of proprietors. Such a change would be of some importance, if the population had remained stationary; but, in order to estimate its significancy, we must inquire what the progress of population has been, during

the same period of time. Now, the population, which, in 1815, amounted to only 29,152,743 souls, had risen, in 1835, to 33,326,573, an increase of fourteen per cent. Thus, while the number of territorial proprietors has increased only eight per cent, the general population has increased fourteen; and, consequently, instead of increasing in the same proportion as the population, the number of proprietors has proportionally diminished. In short, there were reckoned in France, in 1815, one hundred proprietors of immovables, to two hundred and eighty-nine inhabitants; but, in 1835, the proportion was one hundred to three hundred and five; an evident proof that the number of proprietors, compared with that of the rest of the population, has diminished two and one half per cent, or one fortieth.

It must not be imagined, however, that because the number of proprietors has not increased in the same proportion as the total population, the addition of eight and one sixth per cent, which it has received, has had the effect to diminish the relative share enjoyed by each of them. In our days, wealth increases still more rapidly than population; and, in France, the revenue of landed property has risen, since 1815, considerably more than eight per cent. On the other hand, manufactories and buildings have multiplied to such a degree, that the official documents show an increase, from 1822 to 1835, of 464,029, over and above those which already existed. This fact testifies to the abundance of the savings realized by individuals, and, at the same time, denotes a very considerable increase of landed wealth. Further, it demonstrates, also, that every thing in the multiplication of landed estates has not been the fruit of the progress of divisions among heirs: for a very great part of the new erections has necessarily given rise to the creation of new estates.

After having pointed out the true nature of the changes, which, since 1815, have taken place in the distribution of real

property, and shown that the number of persons, in possession of landed estates, has diminished when compared with the rest of the population, it would be important to ascertain what has taken place in regard to movable property. Here, we have but a single source of information,—the number of deaths, and the amount of declarations of succession. If we had the exact state of these for a sufficient number of years, the facts would be easy to establish, and their correctness would not be questionable. But the administration is in possession of but one return of the declarations of succession anterior to the year 1833, that of 1823, and it is hazardous to pronounce in such a matter upon the basis of a single year. There are reasons, however, which induce us to regard the results of the year 1823 as a faithful exponent of the circumstances of the epoch.

The relation between the number of deaths, which annually take place, and the declarations of succession to which they give rise, varies only in periods when children and poor families are the peculiar objects of the attack of mortal disease. In such times, the mortality is considerable, and, as among the persons who fall victims there are, comparatively speaking, few proprietors, the number of declarations of succession falls in comparison with that of deaths. The reverse takes place in periods when the mortality is perceptibly less. Now, in 1823, the number of deaths was a little less than in the preceding years; and this fact would be entitled to some weight, if the deaths of that year alone were to be compared with the declarations of succession for the same year. But such ought not to be the mode of proceeding. As the rights of mutation, in regard to hereditary transmission, are not acquitted until six months after the death of the persons, whose goods pass into new hands, the declarations of succession made in the course of a year must be compared, not with the deaths for the same year, but with the deaths to which they really refer, that is to say,

with those of the first six months of the year mentioned, and those of the last six months of the preceding year. On this system, the deaths, to which the declarations of succession for 1823 correspond, are 760,255 in number; and this amount is enough larger than the average of the six previous years, which is 749,213, to leave it certain, that the declarations of succession, in 1823, cannot have exceeded, in their relation to the deaths which preceded them, the average of the epoch. The following are the results presented by the only years concerning which we have any information.

Years.	Declarations of Succession.	Deaths to which the declarations refer.	Relation between the preceding numbers.
1823	393,606	760,255	1 to 1.92
1833	408,772	873,139	1 to 2.13
1834	404,784	865,263	1 to 2.13
1835	424,819	867,220	1 to 2.04
1836	407,477		

In comparing the numbers belonging to the year 1823 with the average numbers of the three years, 1833, 1834, and 1835, we find that there is an increase of fourteen per cent in the number of deaths, and an increase of less than five per cent only in the number of declarations of succession; or, in other words, that of 1000 persons, who died within the year to which the declarations of succession in 1823 belong, 523 were proprietors of movable and immovable property, and that of 1000 persons who died between the first of July, 1832 and the thirtieth of June, 1835, there were only 477 such proprietors. According to these figures, the movement of concentration in property of every description has been such, that the number of those who possess the disposition of it, though it has increased by a little less than five per cent, has diminished by four and one half per cent compared with the rest of the population.



In order to effect such a result, it is necessary that movable wealth should be much more concentrated, in proportion, than landed property. The declarations of succession, embracing all kinds of property, except government securities, and (as we have seen by the movement of landed property,) the number of territorial proprietors having diminished only two and one half per cent relatively to the whole population, it is to the particular reduction of the number of movable proprietors, that we must attribute the change which has reduced the number of persons dying in possession of movable or immovable property from five hundred and twenty to four hundred and seventy-seven in a thousand.

It must be acknowledged, however, that though the figures we have made use of are exact; though the conclusions we have drawn from them are well founded; and though there is evidence, that movable as well as immovable property is shared by a small portion of the whole population; we do not believe the data sufficiently numerous, to authorize us to assign to the movement, which has taken place since 1823, an extent entirely beyond the suspicion of exaggeration. The three years, concerning which we have positive information, and of which we have taken the average, have been affected, in regard to the number of deaths which they present, by extraordinary circumstances. Among the deaths, to which the declarations of succession correspond, are included those of the last six months of the year 1832, in which the ordinary mortality was considerably augmented by the prevalence of the cholera; and the year 1834, also, was equally fatal. To these causes, in part, is undoubtedly to be attributed the extraordinary increase, which we find in the number of deaths exhibited by the three years ending in 1835. It is to be regretted, that the number of deaths in 1836 is not yet ascertained. We know that in the course of the year there were 407,477

declarations of succession ; and it would be truly gratifying to be able to determine, by the aid of new data, how much in the results which we have pointed out is of regular, and how much of accidental occurrence.

Let us inquire now what change has been produced in the amount of the fortunes distributed among the classes invested with the advantages of property. Thanks to the progressive discoveries which are constantly adding to the productive power of society, and to the constant accumulation of the excess of revenue over expenditure, wealth has increased in France, from year to year ; and, as private fortunes have not multiplied in the same ratio as the population, they must of course have more and more increased in amount.

In order to ascertain the truth upon this point, we ought to compare, at different periods, the number of annual declarations of succession, with the aggregate of the values of which they are composed ; but here also the information we are in possession of leaves much to be desired, and allows us only to make an approximation to the truth.

In fact, before the year 1826, the returns effected by the department of registration have not been classified or footed, except in mass, and their progressive increase teaches us but a single fact, which is, that, like other values, those which have given rise to the perception of rights of mutation by death have increased progressively since 1826 ; but, down to and including 1836, the amount of the values transmitted by descent or testament has been declared officially, and as it has risen from 1,345,711,516 francs, the footing of 1826, to 1,560,320,825 francs, the footing of 1836, there is no doubt, that the general wealth has increased in the same proportion, and been augmented in eleven years nearly sixteen per cent. But what has been the influence of this augmentation of the general wealth on the average of private fortunes ? To estimate it with pre-

cision, we stand in need of a statement of the declarations of succession of 1826; but we can only consult that of 1823, and of the four years anterior to 1837.

However, as it is very certain, that the amount of movable and immovable property, transmitted by the decease of the proprietors, was inferior in 1823 to the amount of the same property in 1826; and, as the rate of increase, commencing in 1826, indicates that this difference cannot be less than three and one half, or four per cent, we shall take for a comparison with the declarations of succession for 1823 the amount of the values declared in 1826. Thus, instead of running the risk of exaggerating, we are assured of diminishing the results; and this will only add to our confidence in them. They are exhibited in the following table.

Years.	Average value of successions.			
1823	.	.	.	3.419
1833	.	.	.	3.589
1834	.	.	.	3.625
1835	.	.	.	3.647
1836	.	.	.	3.805

The increase of value in the amount of successions, between 1823 and 1836, proves how much, in attributing to the year 1823 the footing which belongs to 1826, we must have weakened the differences which they in reality present. Whatever it may be, it remains certain, that the successions declared have increased in average value eleven and one half per cent at least, and this fact attests that a like augmentation has been realized in private fortunes.

Such a change merits great attention. If the classes in possession of the advantages of property have not multiplied at the same rate as the rest of the community, they have nevertheless increased in the thirteen years anterior to 1836 a little more than four per cent; and the fortunes dif-

fused among individuals, instead of being diminished during the same period, have increased with the progressive advancement of the general wealth, eleven and one half per cent at least. Nothing can show more conclusively, with what facility the rich classes not only preserve the property which they have acquired, but also draw into their hands the new wealth which the progress of order and of industry are continually bringing forth and diffusing.

We shall here terminate an investigation, which the want of authentic documents will not permit us to carry further without the risk of error. All that can be added is, that, within ten years, the transfers of movable property between living persons, by onerous or gratuitous titles, have augmented in importance more than in number. But, considering the impossibility of distinguishing clearly, and of classifying separately, according to their nature, acts of which the general accounts of the finances give but a summary indication, we shall not hazard any statements concerning them in figures. The data, which we have employed in our investigations, have been used with all the circumspection, made necessary by their small number; and we now proceed to sum up the facts, which they have enabled us to establish.

In the twenty years preceding 1836, the general population of France has increased fourteen per cent, and, as in the same period, the quantity of landed estates has increased only eight per cent, it is evident, that the number of proprietors, instead of increasing in the same proportion as the rest of the population, has diminished proportionally two and one half per cent; and what renders the fact still more significant is, that the great number of manufactories and houses erected in 1815 must necessarily have multiplied the landed estates, as well as furnished new and abundant elements of immovable property.

In the second place, movable property has become still

more concentrated than landed property. Judging by the comparative rate of deaths and declarations of succession, the proprietors of movable and immovable property, who, in 1823, formed five hundred and twenty thousandths of the whole population, constituted no more than four hundred and seventy-seven thousandths of it, twelve years afterwards. We have mentioned the reasons, which induce us to believe, that this change, however marked it may be, may very probably be in fact less than is indicated by the figures.

Finally, while the general wealth of France has increased sixteen per cent in ten years, private fortunes have increased at the rate of eleven and one half per cent, to the profit of a class of proprietors, who, during the same period, have only participated at the rate of four per cent in the development of the whole population, while the latter has increased at the rate of seven per cent.

Such are the changes which have taken place in France in the distribution and situation of private fortunes; and, so far from having led to more equality in the distribution of property, testamentary and hereditary divisions have left causes of inequality remaining, and a movement of concentration has been effected.

In view of such a fact, accomplished in presence of a system of inheritance, the most conformed to rules of equity, the best adapted to the interests of the popular classes, the most favorable to the diffusion of the benefits of ease and of property, it is impossible not to recognize the power of one of those primordial laws, to the dominion of which societies are bound to submit themselves, and the course of which they cannot attempt to arrest or change, without calling upon themselves misfortunes more grievous than those which they pretend to avoid.

If experience has shown that those institutions, which add to the activity of the natural causes of the inequality of

wealth, do not fail to weaken or corrupt the few, and to retain the masses in an indigence fruitful of physical suffering, and of intellectual and moral infirmities, every thing attests, that institutions destined to impose limits to the accumulation of private fortunes, or restrictions upon their hereditary transmission, would be still more injurious. In depriving individuals of the liberty of elevating themselves as high, as the faculties with which they are endowed will permit them, or of the right to prepare and assure to their children the best possible future, they would weaken or destroy the only motives which impress upon labor the utmost energy of which it is susceptible. The most capable men would stop at a given point of fortune, as soon as they had attained it; and society, deprived of the impulse which they communicate, would not be slow to decline and go backwards. Nothing, indeed, is better proved, than the principle, that all ameliorations of the social state are due to the inequalities in the distribution of wealth. It is this inequality, which, by assuring to one portion of the community the ease and leisure indispensable to mental culture, gives opportunity to the arts and sciences to flourish for the good of humanity; and every thing, which should stand in the way of its operation, would confine or extinguish the source of those lights, of which societies have need, in order to extend progressively their empire over external objects, and to continue to increase in well-being and in dignity.

It is certainly to be regretted, that the part of each individual in the goods of this world is not more ample, and that so much affliction and misery still subsist in the bosom of the most flourishing societies. But let us look back to the point of departure; let us recollect how destitute were the generations that first lived here below; and we shall acknowledge, that if civilization, as it advances, distributes with an unequal hand the wealth which it produces and multiplies, it does so without taking anything away from

those whom it treats with the least degree of favor. Even the day laborers, in those countries where its gifts are diffused, are better provided for than the richer members of communities yet uncivilized; and, where the wisdom of the laws sufficiently guaranties the security of property and persons, the continued development of arts and industry assures them a reward for their labor, which, as it increases, tends more and more to free them from the evils of indigence. The number of laborers then is of little importance; for if it increases, wealth increases still more rapidly, and its accumulation brings them new and larger means of enjoyment.

Such is the progress of things in all countries which are in a prosperous condition. In France, within thirty years, the population has increased eight per cent; but wealth has increased more than sixteen per cent; and if the classes in possession of the advantages of property have seen their fortunes augmented, those which subsist upon daily wages have seen the stock which rewards their labors accumulate with more rapidity than the number of hands destined to share in it.

In these reflections, nothing has been dictated by a spirit of inconsiderate optimism. They would be going against their own end, if they could tend to weaken the solicitude which is so justly due to the poorer classes, or restrain the sacrifices destined to afford them, in the benefits of education, new elements of ease and of intellectual and moral elevation: but there are some social facts which are the work of a wisdom superior to ours; and when the laws of succession in any country do not sanction any privilege of property; when they leave to each one the liberty to go as far as his faculties will permit him; when they give to the rights of succession no other limits than the degrees of relationship; it is to be presumed that they are irreproachable, and that the results which they produce are, for the time, at least, the most conformable to the true interests of all.

## ART. V.—SKETCH OF SIR WILLIAM BOLLAND.

[Abridged from the *Law Magazine*, for February, 1841.]

SIR WILLIAM BOLLAND, the eldest son of William Bolland, of London, merchant, was born in 1772. He was educated at Reading, under the late Dr. Valpy, at the same school which boasts the honor of having sent forth Mr. Serjeant Talfourd, another and one of the most distinguished of that class of lawyers of which the profession has most reason to be proud. He left Reading school for Trinity college, Cambridge, at the usual age for entering the University. He here formed a friendship with lord Lyndhurst, (then Mr. Copley,) which remained unbroken till his death. They took their degrees about the same time, (1794,) and appear to have been, in the strictest sense of the word, cotemporaries; but their ambition was of a different order.

The inn of court of which he became a member with a view to the bar, was the Middle Temple. His instructor in the noble science, (as Coke truly terms it,) of special pleading, was the late Mr. Justice Holroyd; and it is to be presumed that he devoted more than cursory attention to it, as he subsequently practised for some years below the bar. He was not called till Easter Term, 1801.<sup>1</sup> He joined the home circuit, and attended the Kent sessions, as well as those for London and Middlesex, and the metropolitan criminal courts. In all of these, no doubt aided by his father's connections, he soon obtained extensive practice, and on Mr. Knowlys's appointment to the office of recorder, he succeeded that gentleman as one of the city common pleaders. He retained this situation until he was raised to the bench, when he was succeeded by Mr. Russell Gurney.

<sup>1</sup> We invariably refer for dates to that very useful book, *Whishaw's Synopsis of the Bar*.



Sir William Bolland was a good, though not a deeply-read, lawyer, and a sensible, well-informed, judicious and gentlemanly advocate.

He was made a baron of the exchequer in Michaelmas term, 1829, his friend lord Lyndhurst being then lord chancellor. Some doubts were certainly entertained at the time as to the propriety of this appointment, and we ourselves were amongst the cavillers; but we were wrong. Lord Lyndhurst knew his man: it was not a mere private preference, but a deliberate conviction of the fitness of the candidate, that influenced his decision; and it is allowed on all hands that the late baron's sound sense, knowledge of the world, and liberal, upright, manly tone of mind, more than compensated for any comparative deficiency in legal attainments. He turned out a respectable judge in civil business, and a very good one in criminal cases. The slowness, which might occasionally have been charged against him, was solely owing to his conscientiousness.

His fondness for rare and curious books began very early in life, grew with his growth and strengthened with his strength. At one time he was quite enthusiastic in the pursuit; and the sum produced by the sale of his library, (exceeding £3000,) bears ample testimony to his munificence and judgment in this particular. It is not the least remarkable circumstance of his career that his descendants are entitled to inscribe upon his tombstone: "Here lies the founder of the Roxburgh Club." It took its rise at a dinner party at his house. He had also amassed a valuable collection of coins.

He married (in 1810) his first cousin, Elizabeth, daughter of Mr. John Bolland, merchant, a lady of great personal attractions, by whom he has left three sons and two daughters. Sir William Bolland retired from the bench on account of ill health in January, 1839, and died in May, 1840.

**ART. VI. — ON CODIFICATION, OR THE SYSTEMATIZING OF THE LAW.**

[By J. LOUIS TELKAMPF, Jur. Utr. Dr. of Goettingen Univ., Professor in Union College, New York.]

*Introduction.*

IN every human society the law must govern, and must control the arbitrary will of the individual; nothing, then, can more nearly interest every member of society than a consideration of this law, its nature, and such amendments as in the course of time may be found necessary to adapt it to the change of circumstances. It will be the object of this essay to examine the advantages of the adoption of a code, or in other words, of the reduction of the law into a system.

To a full exhibition of this subject, it will be necessary at the outset, to explain what we understand by law, and what by code.

The term code, we understand to mean a system of law, and would not apply it to those collections of the laws of a country, which have been made without regard to order, and are a mere succession of volumes without plan.

By system, we mean the harmonious arrangement of any number of parts, which appear in their full bearing and importance only when considered as a whole. In this sense, we speak of the system of the heavens, the human system, and others. A system of law, accordingly, is nothing but the form to which its various parts may be reduced, and which is pervaded by a rational principle. We must consider whether the nature of law is such as will admit of this form, and what in that case will be the best arrangement for rendering it more easy of comprehension, applica-

tion, and amendment, as circumstances may require. For as the human body, which is a form in which man's physical existence is manifested, is of essential importance to the operations of the soul within, so, in a similar way, the form in which law is contained is of essential importance to the efficiency of its animating principle.

The small number of statutes existing in the early history of our race, made it easy to retain them in the minds of the whole people, and they consequently had little occasion to regard the form in which they were embodied : but, in course of time, the addition of many thousands of new statutes was required, to meet the wants arising from the complications of society ; and it is an object, now, of extreme consequence, to discover the best and simplest mode in which these laws may be arranged. If it were not possible to systematize law, it would not deserve the appellation of a science.

If, with a view to such an arrangement, we consider the present state of law in this country, we see a confused mass of materials, certainly of very great value, but whose practical utility is much diminished by the incongruous manner in which they have been heaped together. We must remember that this law is of English origin, and was introduced here when the states were colonies of Great Britain, and that it has assumed its present condition during the lapse of ages, and through different degrees of civilization ; we find, therefore, when viewing it in relation to our present circumstances, much crudeness and an almost total want of system, so that it does not readily present the means of gradual amelioration. In this country, too, the previous complication has been much increased by the addition, on the part of the various legislatures, of frequent supplements.

As my purpose, however, is not to censure, I have already said enough of this, and refer for ample proof of what has

been suggested, to fuller expositions of this part of legal science.<sup>1</sup>

This evil has been of late frequently exposed, and its effects have been often felt in the common intercourse of life. It is now, therefore, a question of urgent importance to find the proper remedy for a disorder, which time is rapidly increasing.

To investigate and criticise the many methods proposed for this purpose, would lead me far beyond the limits of a periodical. In future, should circumstances justify it, it will afford me pleasure to pursue this part of my subject, which shall comprise a portion of the substance of two essays, which I have heretofore written with especial reference to Germany.<sup>2</sup> Indeed, some of the leading ideas of the present essay are a republication of parts of one of them.

### *Of the nature of law in general.*

Let us attempt to understand the nature and meaning of all that is comprehended in the term law; for it is obvious that we cannot hope to arrange any materials according to their respective natural characteristics, without being previously acquainted with their nature. The success, therefore, of the present essay, will mainly depend upon our satisfactorily ascertaining this point.

<sup>1</sup> See lord Bacon's Law Tracts, London, 1741, particularly his "proposition for compiling and amending the laws;" "Offer of a digest of the laws;" "Ordinances in chancery, for the better administration of justice in courts of chancery;" Sir W. Blackstone's discourse on the study of the law, p. 27; Brougham's speeches, p. 689; Sampson on codes and the common law, Washington, 1826, Vol. I. p. 20; Hoffman's course of legal study, Baltimore, 1836, Vol. II. p. 674.

<sup>2</sup> "Amendment of the law in the states of Germany, (Ueber Verbesserung des Rechtszustandes in den Deutschen Städten,) Berlin, 1835," and "De longa consuetudine," Hannover, 1835; written, when the author lectured on law, in the University of Goettingen.

The definition of the word law has always been considered one of the most difficult in the whole range of scientific terms, and we need not be surprised at the hesitation with which the question would be frequently met: "What is law?" It is certainly possible for a practical lawyer to pass very well with only a familiar knowledge of business details, and without ever having acquired one idea of the general nature of law; but it cannot be denied that the direction of the present time renders it daily more imperative on all thinking lawyers and statesmen, to raise themselves above the incongruous mass of rules and statutes, and to endeavor to ascertain clearly the leading principles.

Let us introduce the philosophical explanation by a brief consideration of some opinions of eminent men; for such a comparison of different views will serve to secure us against contracted or prejudiced opinions. As we are fortunate enough to have within easy reach whatever past generations have accumulated of wisdom, we ought not to neglect consulting it, in determining questions of such vast importance.

From the period when the philosophy of Greece had attained its greatest splendor, we may see a constant conflict about the different ideas of law; and this, sustained through every succeeding age, has continued to our own time. The opinions on this subject, though numerous, may be classed under two great divisions; each of which is distinguished by a predominating character, and each entirely different from the other.

On the one hand, it is contended that there is nothing absolute or essential in the idea of law; but that it is a mere texture of all the external restrictions, which, like the meshes of a net, confine the members of society. These restrictions were supposed to have been entirely casual, just as any irregular force might have directed. In this view, consequently, law is but an empty shape: in essence, nothing, — in outward form, coercion.

With a few slight differences of opinion, the sophists may be ranged upon this side. Of these, Thrasyarchus maintained that "might makes right," or "that law is the result of force," and that "wherever is the power, there whatever takes place, is lawful; and whatever is lawful, will take place." Thus it might easily occur that one and the same thing should be both right and wrong at once; and thus morality and law would be reduced to a chimera. These ancient dogmas have been revived in our days by Hobbes,<sup>1</sup> Spinoza,<sup>2</sup> Hume,<sup>3</sup> Haller,<sup>4</sup> Hugo,<sup>5</sup> Thomasius,<sup>6</sup> Kant,<sup>7</sup> and Fichte.<sup>8</sup>

On the other hand, the opinion that law has a foundation in reason has, with little differences, been maintained by Socrates, and his two disciples, Xenophon and Plato. The two last differed somewhat in detail, Xenophon, in his *Cyropædia*, representing law as the useful, the expedient, the prudent, (an opinion very similar to that of Bentham,) whilst Plato,<sup>9</sup> in the first two books of the "Republic," considers law as the ideal good. Both, however, as well as Aristotle,<sup>10</sup> maintain, that the moral is an essential element of law.

This latter view received its clearest exposition and most efficient support from the introduction of the equitable and

<sup>1</sup> His works, p. 598, and particularly "De cive."

<sup>2</sup> *Tractatus theologicus politicus*, sec. 1 : *Tractatus politicus*.

<sup>3</sup> *Essays*, particularly that "on human nature."

<sup>4</sup> The restoration of the science of government; (*Restauration der Stadtwissenschaft*.)

<sup>5</sup> *Compendium of natural law*, (*Lehrbuch des Naturrechts*.)

<sup>6</sup> *Fundamentum juris naturæ et gentium*, 1705.

<sup>7</sup> The eternal peace, (*Zum ewigen Frieden*, 1795;) and "the elements of the science of law, examined in relation to metaphysics; (*Metaphysische Anfangsgründe der Rechtslehre*, 1797.)

<sup>8</sup> The foundation of natural law; (*Grundlage des Naturrechts*, 1796.)

<sup>9</sup> *De republica*, libr. 10; *De legibus*, libr. 12; *Politicus sive de regno*.

<sup>10</sup> *Politicoorum*, lib. 8. *Æconom.* lib. 2.

charitable principles of christianity, which necessarily extended its influence over morality and law. The christian idea of the dignity of the individual before God, introduced also into the law the recognition of the rights and dignity of the individual. This influence may be remarked in the criminal law, in the mitigation of punishment; in the law of nations, in the milder treatment of prisoners of war, etc. Thus it will be seen that law gradually gave its assent to some of the most eminent principles of christianity. It is upon individuals, and not upon states, that christianity has acted. States may be free without christianity, but individuals cannot.<sup>1</sup> It has, by rendering the state of man

<sup>1</sup> This religious influence, assisted by the more extended intelligence of modern times, has produced that rational freedom of the individual which is a striking characteristic of our age. This freedom consists in man's being governed by reason and conscience, and not by compulsory and irregular influences, whether by his own passions or from external force. The only mode of estimating man's real freedom is the comparison of his actions with the law of reason; or, as Cowper says,

"He is the freeman whom the truth makes free,  
And all are slaves beside."

Such a freedom being dependent only on the law of reason requires of course no special form of government, whether republican, monarchical, or any other, for its enjoyment, but only a right administration of the law of the land. It is not the power of authority that abridges freedom and weighs unjustly; it is the arbitrary exercise of power; its being made to conquer right and reason. The freedom of the citizen, in the ancient republics of Greece and of Rome, was nothing more than the sum of the privileges which he enjoyed at the expense of slaves and barbarians without number; he himself was anything but free, being in every respect subject to the uncontrolled authority of the people: the individual was counted as nothing, when conflicting with the famous "*Salus publica*," or general interest. Neither were Greece and Rome, even in their best estate, adorned by citizens who could claim any other title than that of Greek and Roman citizens, the idea and title of citizen of the world being then utterly unknown among those nations. They looked upon all other portions of the globe, than their own country, as barbarous; and could not form a conception of any other kind of freedom, than that which was possessed in Athens or in Rome, and which they shared reluctantly with others.

more civilized, made it more peaceful and consequently more lawful.<sup>1</sup>

This latter view was further sustained by the spirit of the Roman law. This law has exhibited such a fund of reason in its unequaled development of the most intricate relations, particularly in those of property, and of contracts, that from its character in this respect, more justly than from its regard to the freedom of the individual which it exhibits, it has acquired the title of "Written Reason" (*ratio scripta*). It has, to a great extent, practically realized all that the most distinguished philosophers of the second party have ascribed to their ideal of law. It has, consequently, by a development of the true principles of reason become an essential part of the law of all ages and nations. Christianity had, previous to its last compilation, exercised much influence on the Roman law.

Lastly, the nature of law according to this view, has been

The present civilized states of the world have no such citizens, indeed, as formed the nations of antiquity, but have, instead, that universal, individual freedom, whose foundation lies in reason and intelligence. The privileged freedom of antiquity, of course, lost value by becoming common, and sunk to utter worthlessness, when, on the fall of the Roman empire, it ceased to be a privilege, by being diffused among all nations. The modern christian freedom, on the other hand, becomes more precious with the increase of numbers and of knowledge of those who are admitted to it.

<sup>1</sup> Some philosophers, as Hobbes, reasoning from the records of history, think that war of all against all, is the natural state of man; and others have arrived at the same conclusion by observation of the uncivilized character. In this they appear to mistake. War is certainly the natural consequence of barbarism, when, for want of better arguments, fists or clubs are used, as we daily see among the uneducated of our own cities. Among them, the criterion of rank and honor is the degree of the development of the body only. But the natural state of man is that in which all his powers are developed, as well of mind as of body, and in which he is governed by the dictates of reason. This state certainly cannot be said to be artificial, for whoever would say that, would declare our reason to be artificial, and our bodies the only part to be cultivated.



expounded by Blackstone,<sup>1</sup> Hooker,<sup>2</sup> Grotius,<sup>3</sup> Montesquieu,<sup>4</sup> Jean Jacques Rousseau,<sup>5</sup> Leibnitz,<sup>6</sup> Hegel,<sup>7</sup> Krause,<sup>8</sup> Wolf,<sup>9</sup> Hoffman,<sup>10</sup> and others.

This second view of the law, I hold to be the true one, and I shall now proceed to unfold and explain my own opinion. It might be inferred, that the foundation of law must be laid in an innate faculty of man's soul, and consequently one common to all men, from the fact that all nations have been known to possess certain invariable or surprisingly similar laws and institutions, whilst the individual laws of each have no connection with one another and seem to have sprung from local and other incidental causes. We may derive a further support of the inference, that there is this common principle, from the unanimity in the answers given by individuals even of the most different nations who may not have made a study of the law, to questions relating purely to justice and injustice. This unanimity will be found to hold to a greater and even surprising extent in young persons whose answers will generally be simply guided by the dictates of reason and conscience.

All those great questions which relate to man as such, as a being responsible to a superior, and as a member of society,

<sup>1</sup> Analysis of the laws of England, ch. I.

<sup>2</sup> Ecclesiastical Polity book 1.

<sup>3</sup> De jure belli et pacis, lib. 3.

<sup>4</sup> De l' esprit des lois, livre 1.

<sup>5</sup> Du contrat social ou principes du droit politique.

<sup>6</sup> Nova Methodus discendæ docendæque jurisprudentiæ ex artis didacticæ principiis in parte generali præmissis, experienciæque luce; Cum præfatione C. L. B. de Wolf. Lips. et Halæ 1748; Principia philosophiæ; Codex juris gentium diplomaticus.

<sup>7</sup> Philosophy of the law, p. 34, 63, etc.

<sup>8</sup> Philosophy of the law, part 1, ch. 1.

<sup>9</sup> Natural law, 1740.

<sup>10</sup> Course of legal study, vol. I. proem.

will be reduced by the clear and unprejudiced minds of youth to the purest moral standard, and will be answered in a beautiful and unanimous accordance with the influence of truth. Truth, at that age, receives from the still candid mind an entire and, as it were, instructive veneration and adoption, and occasions an instantaneous repugnance to the distortion of its own eternal principle. It is then apparent that morality and law are really but one principle in essence, though different in form and application; since both lie in the reasonable nature of man, both decide between right and wrong in action.

For a still further proof of this latter opinion, we turn to a consideration of the law of nations, which is based upon a number of general principles, which all civilized nations have harmoniously regarded as reasonable and necessary for the welfare of all, and have consequently declared to be binding upon all.

Another proof of this opinion is the destiny and ultimate end of man. In this earthly state his end and destiny are, as we know, so to shape his course, as perfectly to develop his entire being in all its relations to the Creator, to himself and to the world about him. The development of the reasonable and moral nature being thus the object of man's existence it will be necessary for the laws under which this object is to be effected, to be laws derived from his reason and moral sense. Consequently it is not the power, but the unreasonableness of a law, which makes it weigh heavily upon human nature.

From what has been said we may infer that the source of law is in the ideal. We may *define* law as the result of reason applied to the external affairs of man; when applied to the internal affairs, it is called morality.

Law being therefore so immediately dependent upon reason, it will be necessary to make a few remarks upon the nature of the latter.

Reason is nothing but a system of harmonious rules controlling the power of thinking correctly, which seems to be subject to one supreme rule, for without such there would be no order. What then is rule? Rule is that constant and invariable form according to which every thing apparently irregular moves and is concordant. There is, as was remarked above, something ever constant in the reasonable thoughts of the human race in all ages, times and countries, which seems to indicate a supreme rule, which is the centre of that system of controlling rules of the mind, and was originated in our souls by God, as the infinitely and absolutely rational and just being.

The power of thinking, of which we have spoken, is not itself any rule capable of definition by words, but a faculty under the direction of the rules of reason, ever ready to decide the various questions submitted to its jurisdiction.

It cannot be justly supposed that moral beings, on account of the freedom of their will, were not governed by rules of absolute accuracy; for the partial reduction of the mental processes to orderly and accurate systems, as we see in logic, &c., indicates that the laws of the moral nature are as absolute and as invariable as those of the physical world. And consequently one of the most eminent intellectual philosophers of the day, professor Herbart, of Goettingen, in his *Psychology*, has attempted to reduce mental philosophy to a system of mathematical principles; such as we trace in astronomy, chemistry, physics, and in general in all the departments of nature, which seem absolutely to govern the material world; the laws, as far as we perceive them, in which the government of the divinity exhibits itself in the latter being mathematical laws. Thus the natural sciences appear to be mathematics in application.

It seems then that the eternal principle which orders all things in the world is the same which is found to pervade and direct the very being and essence of man. It is called

in that form reason, and is seen to incline the actions of mankind to a general conformity to its own rules ; and in this case we have termed it law. Law, therefore, appears, in the abstract, as the image, the ideal, of a perfect uniformity between man's actions and this divine principle. This law is positive and affirmative, able to exhibit all the conditions of a free, reasonable life ; and is not merely, as it is commonly supposed, a collection of the restraints imposed upon the freedom of human action.

A perfect system of law we could consequently call the reign of reasonable freedom, or the government of the reasonable mind carried out in the external world, and it would be therefore what Leibnitz calls a reign based upon laws : "*Civitas Dei*."

Since some philosophers and statesmen have looked too much to the free will for the source of the law, not sufficiently discriminating real freedom of the will, it is necessary that we make a few remarks on this subject.

The source of the law is, as we have seen, reason, — but its enacting power is the will, which, in order to be free, must itself follow the direction of reason, — otherwise it would be wilful and unreasonable, being under the impulse of passion. Taking also will into consideration, we can give the following definition of law, which will be found to agree with the previous one. Law is the determination of our will, in accordance with reason.

One, who may never have introduced into his mind the government of reason, may fancy himself free, when his actions are wilful and without restraint, but, acting, as he thus acts, under the arbitrary impulses of his own nature, and without exerting over his will a rational control, he only shows himself not free. He that exerts his will according to the rules of reason will be seen to act not as an isolated individual, but in harmony with an eternal principle. In acting he will be less prominent than the actions

themselves; whilst, on the other hand, the man who perversely acts without regard to reason, will exhibit more prominently his own depraved individuality. Reason is the highway, in which all may travel without making themselves conspicuous.

When a great genius has executed a master piece of art, spectators cannot help exclaiming that it is right; which means, that truth has been represented, and the author's individuality suppressed; that no mannerism is visible. Raphael has no mannerism; his figures seem to have life, and stand forth from the canvass. It is therefore a narrow and false principle, to hold that arbitrary might can constitute right. For it is only the might of reason which can obtain for a law the universal and permanent consent of mankind. This will fully explain the cause of the gradual decline of all those laws which are contrary to reason, even though in the first instance they may have been established by the power of physical or other accidental force. The chief principle of a law which shall hope for permanence, is to be found in the degree of its approach to the reasonable in man's nature. For man, being a creature endowed with reason, cannot be expected long to submit to be governed by laws which are not founded in reason. It is not consistent for a reasonable being to be governed by any thing unreasonably. And it is proved by experience that laws of the latter description have never been able to endure for a great length of time.

In proportion as statutes shall approach the inherent principle of man's reasonable nature, in so far will be the advance of men to meet such statutes; as the acknowledgment of truth, whether in jurisprudence, in morality, or in any other science, is instinctive and natural. As it is obvious that under certain conditions the development of the public mind may not be such as to enable it immediately to appreciate the higher and better applications of reason,

while it is at the same time necessary that truth shall in the end, as public intelligence is increased, be perceived and adopted, it is therefore of manifest importance that legislators should be the most intelligent and rational men of the community. For it is far better, that the laws should be even in advance of the public mind, and thus require the latter to be elevated, in order to attain their level, than that they should be below it, and thus either sink it in the scale of improvement, or destroy at once the respect and ascendancy which they ought to maintain. With good laws men will become better, and with bad laws they may become worse, as may be seen in the example of some of the old criminal laws, and those for the imprisonment of debtors. In any case these laws can and ought to be derived from reason, adapted to the condition and wants of the people according to their historical development.

As, therefore, the law of a nation must in all its ramifications be deduced from reason, it will follow, that law will be of a more or less elevated character, according to the greater or less advance which that nation shall have made in the development of its reason. The degree of that advance will be the measure of the state of the law by which it is or ought to be governed. Distinctive elements are besides given to it, by the leading features of the nation, by its history, and by the modifying influences of climate, geographical position, and other circumstances.

#### *Nature of Common Law.*

Law, as previously exhibited in its purity and conformity to reason, forms only the fountain head of all statutes, and is very seldom found in its perfection in practice. The reason of this fact is not merely to be found in an imperfect development of the public mind, which would prevent its appreciating truth and justice, but also in the many counteracting elements of society, such as self-interest, the pas-

sions, and which, like the opposing force of *vis inertiae* in mechanics, require the application of uniform and continued power to produce the proper effect. Thus, though truth has an irresistible claim upon the human mind, and will at length be recognised and adopted, yet those who first propose it, when the intellectual condition of society is opposed to it, or unprepared for it, may often fall martyrs to their own cause from not possessing themselves of this simple principle. Those, therefore, who would bring forward truth, must be persevering and courageous, and, if possible, connect it with power, in order to exhibit it properly, and make it felt.

Consequently, what is reasonable in itself must first have power on its side before it can establish itself as law; and this must be the legislative power, and that legislative power must be highly intelligent.

From history we learn, that, on account of this conflict, the influence and progress of truth upon great masses have been like the motion of a vessel beating against the wind; for the most reasonable part of the community is drawn from its straight-forward course, by the passions and self-interest of the other, and may congratulate itself, if its course be at all progressive.

Law is classified according to the different objects to which it is applied. We may here take one general division from the Roman law; this will be into public and private. Public law, *jus publicum*,<sup>1</sup> appears under the form of the law of nations, and of the constitutions of nations or states, whether written or otherwise; private law, *jus privatum*, is what governs the relations of individual members of society, or what in English is called municipal law.<sup>2</sup>

<sup>1</sup> Publicum jus est, quod ad statum rei romanæ (rei publicæ) spectat; privatum, quod ad singulorum utilitatem. Justiniani Instit. lib. 1, tit. 2, § 4.

<sup>2</sup> Kent, in his Commentaries, vol. i, part 3, lect. 20, page 447, defines municipal law, as a rule of civil conduct, prescribed by the supreme power in a state. It is composed of written and unwritten, or statute and common law.

The first, public law, though not yet reduced to a code, as respects the law of nations, can still in its other departments be seen systematized in the constitutions of the several states of the union.

In the last form, it being fully and distinctly written down, I confine myself entirely to municipal law, (*jus privatum*.) This is divided into common law and statute law, which differ in the nature of the power by which they have been established, the one being by custom, the other by legislative authority.

The common but erroneous opinion, that the greatest part of all law is the work of a regular legislative authority, will make it the more necessary to give a distinct account of the origin and nature of common law. To look for this immediately under the form of distinct statutes would be in vain; it is not so formed. First, we may see it in the guise of manners and customs, which represent the permanent features in the general character of a nation. These permanent features, as remarked before, are formed as well from the individuality of the nation, as from the circumstances of soil and climate. Manners and customs, therefore, are the first expressions of the law, which will continue forming, with the whole spiritual and physical life of a people, and will be modified by increasing knowledge, by the forming of new relations, and by the change of necessities. They will become, like language, perfectly blended with the nature of all who may have grown up with them; but will gradually disappear if unable to adjust themselves to the alteration of circumstances. The common law, therefore, of every nation should be considered as a member of its body, and by no means as a robe, that has been fashioned at pleasure, and may be cast off at will.

The same power of man's soul, which has been seen to be the origin of all law, will equally impart to the most



complete state of jurisprudence a forward or a retrograde motion. A perfect state of rest is as little to be expected in law as in life, or in language, or in customs; so that there has never yet been a code which had not in fifty years, by addition and new habits, lost much of its original character. Law cannot be said to spring from legislative acts or statutes alone; on the contrary, statutes ought to be principally the expression of the legislative sanction of what has, by its consistency with reason, established itself in the law of custom. As only that part of the common law which has already been definitely fixed, can have been written down in statutes, and as we have already said that this law has been developing itself in past time, and still, and continually develops itself by custom, it will be readily seen, that it can never, at any one time, be entirely a written law. The real source, we have already shown to be in man's consciousness, and the source of all additions to it, at all times must be the same. But as these accessions are made by custom, it will be quite clear that customs should only form themselves into law, in as far as they are true expressions of this consciousness.

This law of custom, this result of the constant application of the reason of all the people to the circumstances and wants of all the people, is obviously the largest field for the application of those original principles of law.<sup>1</sup>

In the development of common law, out of the general consciousness of the people, the following constant reciproc-

<sup>1</sup> The Romans acknowledged reason, *ratio*, to be the foundation of common law, by requiring the *consuetudo* to be *rationabilis*.

My dissertation: De longa consuetudine, page 5—12; Corpus juris civilis, Lex 2, Codicis, lib. 8, tit. 53: Verum non usque adeo sui valitura momento, ut aut *rationem* vincat, aut legem; and, Institutiones Justiniani, lib. 1, tit. 2, § 9: Ex non scripto jus venit, quod usus comprobavit, nam diuturni mores consensu utentium comprobati, legem imitantur.

Novel, 134, Cap. 1. Malaque consuetudines, neque, ex longo tempore, neque ex longa consuetudine confirmantur.

city will be found to hold ; ideas proceeding from certain intellectual men sink into the hearts of the people, are found in the daily intercourse of life to have a real practical value, and are by degrees variously and extensively improved upon. At the same time, those ideas which happen to exist in the minds of the people, and in the spirit of the times, will be found to exercise a great though imperceptible influence on the rising generation of intellectual men, who, as we are taught by history, have been then only really great, when they rightly interpreted the tendencies of the age and of the people, and guided the latter with all that commanding energy and moral distinctness of purpose, which so emphatically mark extraordinary characters.

In this action and reaction common law will be developed and perfected ; but it will not possess any constraining force until it shall be acknowledged as a general rule by all or the greater number of the people ; its validity will therefore entirely depend upon its appearing that there is a very general consent of all parties in its favor. The agreement of a few individuals, it is evident, could never be taken as authority in this matter. Habits and customs thus grow into law, and their guarantee is contained in the will of the majority. Undoubtedly there are many of a different mind, who may never have agreed to those laws which they are notwithstanding obliged to obey, and which they may certainly look upon as coercive, but there is no help for them. If we examine the matter closely, we shall find, that the greater part of all laws, both public and municipal, has originated in the superior will of the more powerful or intellectual. It is certainly a weak side of this law, that it thus depends upon the will of the majority ; for the greater number of votes is no clear proof of the truth and justice of the decision ; it is quite possible for the minority to be the wiser and the better instructed. Therefore, according as

the laws have been made by physical or intellectual force, they will be selfish or reasonable, partial or universal, good or bad. The only remedy that can be applied to this evil is the greater diffusion of knowledge among the people.

Common law is thus popular autonomy, and, inasmuch as it is formed by the spirit, not of a single legislature, but of a whole people, during a long succession of ages, belongs truly to them, as an heirloom, which their fathers have held from time immemorial, and have transferred to them, and which they may doubtless modify for their own use; but whose character they should carefully preserve and leave unmodified to their descendants.<sup>1</sup> Such laws only are dear to a people, and in their estimation infallible. They have imbibed them with the traditions of the oldest inhabitants, and have known them since childhood, and have seen them existing under the same roof with themselves. Custom law or common law may therefore in all reason be considered an inseparable mixture of sacred and common ingredients. And though its origin be mystical and obscure, the strong and ardent attachment which the people bear towards it, may still be easily explained from its having continued with them from the period of their earliest recollections.

Law, when left in this manner to its natural progress, will conform itself to the internal characteristics of the people. This natural course is invariably found to be in accordance with certain general customs which, when care-

<sup>1</sup> It is a noble and true opinion which the compiler of the Saxon law has expressed in the following words:

"This law, 'tis not of my invention,  
'T was of old handed down to us  
By the wisdom of our forefathers."

In the language of the original:

"Dies Recht hab ich nicht erdacht  
Es habens von Alter uf uns bracht  
Unsere gute Vorfahren."

fully studied, will be seen to contain the germs of those statutes which shall be suitable at any time to the existing state of things.

From what has been said, it will be acknowledged, that from its nature the common law has a stronger hold upon the people, and is more equitable than statutes, which may be temporary and partial. From its forming a part of the life of a nation, it will be as difficult to alter it suddenly to any considerable extent, as to change the habits of an individual. A nation may be more easily subdued, than changed in its habits and customs.

In accordance with this fact, the northern tribes, barbarous as they are commonly considered, showed much sound sense in so constructing their institutions upon the ruins of the Roman Empire, as to permit all those subjected to them to live according to the laws and customs of their respective countries.

Napoleon, on the other hand, it must be granted, whatever opinion he entertained of his code, showed little political judgment, or great disregard for the principles of human nature, in compelling its summary adoption by the nations whom he conquered.

But with all the advantages abovementioned, common law is attended with considerable difficulties. In a nation, just rising in the scale of civilization, inhabiting a small portion of country, and still simple in its institutions and interests, there may exist a great degree of simplicity and unity in its common law, so that it may be preserved in the memory of the people. But when these institutions and interests shall have become, as in the present day, greatly complicated, and be coupled with the diffusion, over a vast country, of a scanty population, it will be impossible to expect the same opinions and ideas to prevail in regard to particular customs; and the more impossible if with the increase of civilization the employments of the people have

become the more distinct and subdivided, so that what was formerly done in common has now been assigned to particular classes; for the jurists compose one of these classes, and through their labors a direction is given to the law.

In the same manner, therefore, as in simple ages law was found to live in the minds of the whole people, so now it ought to exist in the minds of the jurists, by whom the people must be supposed to be represented in this function. Since then the principles of law, in the course of time, naturally come under the full control of the judges and the lawyers, it is of the utmost importance, that means be devised for thoroughly acquiring a knowledge of law, by a well grounded jurisprudence,<sup>1</sup> and a good civil code; and that each of these should be continually adapted to those changes which the altered state of society may have occasioned.

The unwritten part of the common law, which exists only in the form of custom, is very different from statute law, in respect to its susceptibility of proof. The former derives its ~~only~~ authority from its being known and assented to by every individual, or by the majority, whilst the latter, having the authority of the legislature, offers the most perfect evidence for its support. Common law is not so precise, and a knowledge of its leading principles not so distinct, on account of its being made up of an accumulated mass of details; consequently, the fault to which it is liable is uncertainty of application. Its meaning, therefore, in order to remove the uncertainty, ought to be expressed in precise terms, and its principles arranged in systematic order.

This has been attempted by writing down the customs, and by putting into the form of statutes certain detached portions of this ever-growing law.

In this way these portions have been determined, and

<sup>1</sup> It has been gratifying to observe the excellent beginning which the law schools in this country have made, and which promises well for the wider diffusion of a sound legal science.

sanctioned, and their meaning precisely ascertained, so that they have ceased to be exposed to the changes incidental to this kind of law. But the greater part of the common law has not been so secured, and consequently, its existence must be often proved by protracted litigation. Now an essential ingredient in the nature of all positive law is compulsion; as otherwise, laws would be ineffectual, and be mere empty words.

This compulsion is necessary to all law, but does not exist in the common law, until it is expressly invested therewith, by the public and decisive sanction of the legislature, and thus rendered authoritative in the eyes of the people. To this end common law must be provided with this necessary support, and without it will be less effectual. All principles which are founded on custom, and have any reference to law, ought to be carefully investigated in all their extent and bearing, and be clearly laid down in a general code. But it is not enough to collect together the scattered rules of common law, without principle or system; as such a code would, by reason of its disconnection, entirely fail in its object, and at the same time be deficient, difficult of application, and wanting in precision.

*The present state of American municipal law.*

Unhappily, it must be confessed, that the common law of England, as we find it, patched with statutes, has been compiled after the latter fashion, without any regard to suitable arrangement; although its intrinsic merits would well entitle it to a thorough exposition, on account of the merit of its fundamental principles. Blackstone, in his commentaries, has proved to the world the possibility of its clear development from those principles. At the same time, it must not be forgotten, that those ancient customs and laws bear many marks of the crudeness and inexperience of the times, so that without being considerably modified, they

could not, in many cases, answer the necessities of the present age : and the same may be equally said of the old English statute laws, which, according to lord Coke's impartial testimony, confirmed by Blackstone, were compiled in a temporary and special manner.

"For, to say the truth, almost all the perplexed questions, almost all the niceties, intricacies, and delays, (which have sometimes disgraced the English as well as other courts of justice,) owe their original not to the common law itself, but to the innovations that have been made in it by acts of parliament, 'overladen,' (as lord Coke expresses it,) 'with provisions and additions, and many times, on a sudden, penned or corrected by men of none or very little judgment in law.' This great and well-experienced judge declares, that in all his time he never knew two questions made upon rights merely depending upon the common law ; and warmly laments the confusion introduced by ill-judging and unlearned legislators. 'But if,' he subjoins, 'acts of parliament were, after the old fashion, penned by such only as perfectly knew what the common law was, before the making of any act of parliament concerning that matter, as also how far forth former statutes had provided remedy for former mischiefs and defects discovered by experience, then should very few questions arise, and the learned should not so often and so much perplex their heads to make atonement and peace, by construction of laws, between insensible and disagreeing words, sentences, and provisions, as they do.' And if this inconvenience was so heavily felt in the reign of queen Elizabeth, you may judge how the evil is increased in later times, when the statute book is swelled to ten times as large bulk ; unless it should be found that the penners of our modern statutes informed themselves better in the knowledge of the common law."<sup>1</sup>

<sup>1</sup> Discourse on the study of the law, page 29.

Whatever is true concerning a body like the parliament, would be true concerning legislative bodies here and every where ; but in no country is there such a probability of conflict of laws, as in this, where there are so many legislative bodies in operation.

The English criminal law, noted beyond all others of Europe for its severity, though not a part of the municipal, but of the public law, should be incorporated in the proposed code. Blackstone complains of its rigor<sup>1</sup> and we see from the speech of Mr. Thomas Fowell Buxton, in the house of commons, March 2, 1819, that its severity has been increasing.

The laws of England punished with death, under the Plantagenets, four kinds of crime ; under the Tudors, twenty-seven ; under the Stuarts, ninety-six ; under the Guelphs, one hundred and fifty-six.

Of late these laws have been slowly mitigated in England ;<sup>2</sup> but with great rapidity in the United States. In the English common law is contained more of the Roman law than is commonly supposed in this country. Not only have many principles of that law been adopted, but whole sections appear as almost translated ; as, for instance, those of the right of possession ; the fundamental principles of contracts ; *successio ab intestato*, &c. ; thus securing many excellent principles in regard to property and business, and at the same time drawing from the old Saxon law those principles favorable to personal security and freedom. Consequently, the English law, in its composition, at the present time, offers greater intrinsic merits than the common law of most of the countries of Europe. For proof, it is sufficient to refer to the authority of certain well known jurists. Judge Story not

<sup>1</sup> Commentaries on the laws of England, vol. 4, chap. 1.

<sup>2</sup> It is hardly necessary to refer the reader to the services done to criminal law by the powerful and benevolent mind of the late sir Samuel Romilly.



only expresses a similar opinion in his works, but proves by facts, particularly in his commentaries on the conflict of laws," the great advantage which able jurists may derive from the study of the Roman law. Chancellor Kent, in his commentaries has the following: "But the more liberal spirit of modern times has justly appreciated the intrinsic merit of the Roman system. Sir Matthew Hale, according to the account of bishop Burnett, frequently said, that the true grounds and reasons of law were so well delivered in the digest, that a man could never well understand law as a science without first resorting to the Roman law for information, and he lamented that it was so little studied in England. And in *Lane v. Cotton*, that strict English lawyer, lord Holt, admitted, that the laws of all nations were raised out of the ruins of the civil law, and that the principles of the English law were borrowed from that system and grounded upon the same reason." And again, "The rights and duties of tutors and guardians are regulated by wise and just principles. The rights of absolute and usufructuary property, and the various ways by which property may be acquired, enlarged, transferred, and lost, and the incidents and accommodations which fairly belong to property, are admirably discussed, and the most refined and equitable distinctions are established and vindicated. Trusts are settled and pursued through all their numerous modifications and complicated details, in the most rational and equitable manner. So the rights and duties flowing from personal contracts, expressed and implied, and under the infinite variety of shapes which they assume in the business and commerce of life, are defined and illustrated with a clearness and brevity without example. In all these respects, and in many others which the limits of the present discussion will not permit me to examine, the civil law shows the proofs of the highest cultivation

and refinement; and no one who pursues it can well avoid the conviction, that it has been the fruitful source of those comprehensive views and solid principles, which have been applied to elevate and adorn the jurisprudence of modern nations.”<sup>1</sup>

Mr. Hoffman,<sup>2</sup> in one of his works, says, “The American law student will also with pleasure bear in mind that in all of these, and in numerous other particulars, in the *jus privatum*, we have conformed our law to the Roman model. The truth is, that the numerous departures of the American law which have taken place since the middle of the last century, from the law of our forefathers, have been little else than so many approximations to the Roman code.” . . . “Are there not weighty reasons why the learning of this country should be enriched and adorned by the splendid results of the erudition, wisdom, and labors of jurists, aided and fostered by imperial munificence. Have we not in our codes adopted and amalgamated the doctrines of the civilians to a greater extent than our mother country?”

“We may adopt with perfect truth the remark of Arthur Duck, when speaking of the authority of the civil law in Scotland, that it obtains here as there *in casibus omissis*, for it is unquestionable that there are large departments of our jurisprudence, in which (in the absence of more authoritative law) we may and ought to resort to the civil law for light, for instruction and for authority. We say authoritative law, because, having adopted the particular system as a portion of our scheme of jurisprudence, and that having sprung from the Roman code, we are bound *in casibus omissis* (and so we have done by long usage) to resort for illustration and authority, to the pages of the digest and code, in the same manner, and with the same views as we

<sup>1</sup> 1 Kent's Commentaries, 546.

<sup>2</sup> Hoffman's course of legal study, second edition, page 518.

at present resort to the modern British authorities on innumerable other subjects. In our courts of admiralty and maritime jurisprudence, also, and in our courts of equity, on various subjects, as likewise in the law of contracts, of executors, of bailment, legacies, presumptions, accession, confusion, extinguishment, set-off, &c., we should appeal to the civil law with as much confidence as if we were resorting to an authoritative source, &c. The law of Rome, in such cases, is not, as has been justly remarked by a Scotch writer,<sup>1</sup> our law from any authority, either of the republic or of the emperors; but it is authoritative, because we have made it so (the people exercising the same right as in the formation of their common law) by adopting certain systems of laws which were brought into existence and made known to our forefathers only by the Romans. And these systems are to be found in the Justinian and other Roman codes.”

As the wisdom of not passing by unnoticed the Roman law in any endeavors to amend the existing laws has thus been rendered manifest, it may not be considered out of place to give here the opinion of the great Leibnitz on the Roman jurisprudence. *Dixi sæpius post scripta Geometraum nihil extare, quod vi ac subtilitate cum Romanorum jureconsultarum scriptis comparari possit; tantum nervi inest, tantum profunditatis.* “I have often said that after the writings of the geometricians there is nothing extant which in force and acuteness can be compared to the writings of the Roman jurisconsults, there is in them so much nervousness, so much profoundness.”<sup>2</sup>

This manifoldness, in the English law, expresses at the same time the great activity of the internal life of the nation which could not be restrained to one manifestation, but

<sup>1</sup> Wilde's Lecture, Edinb. 1794.

<sup>2</sup> Leibnitz, Opera, vol. 4, pt. 3, p. 267.

which has secured for itself the liberty of expanding in all directions. Thus societies and individuals find under such a system an opportunity for the development of their own individuality.

The danger, however, inherent in its nature would seem to be, that a want of unity and consistency would manifest itself in the adaptation of this law by each state to its own wants, and that the differences thus inevitably ensuing between the systems of the different states would tend to separate and disorganize. At the same time, however, the common basis of all the codes would prove a bond of sympathy and mutual relation between them. And lest from this same multiplicity there should be a want of certain fixed and clearly defined principles, preserving a harmony throughout, we must seek to find and exhibit a unity in the whole.

These sources of law, so far as they were applicable to colonies, were, it is well known, introduced here during the period of colonial administration, and with some necessary modifications were retained after the declaration of independence. It may be said, of the confusion of these English laws, just what Livy, long before the appearance of Justinian's code, said of the Roman laws: *Nunc in hoc immenso aliarum super alias acervatarum legum cumulo fons omnis publici privatique est juris*, and what Bacon said of a similar state of the law: "*Non sunt peiores laquei, quam laquei legum; si, numero immensæ, et temporis decursu inutilis, non lucernam pedibus præbeant, sed retia potius objiciant.*" There are also in the Faust of the German poet Göthe, some observations on the tendencies of the common and statute law, unless continually amended so as to suit the altered state of society, which apply very aptly to this subject:

*Mephistopheles :*

Law and statutes are descending,  
 Like disease from race to race,  
 And, contagiously extending,  
 Slowly pass from place to place ;  
 Good in time grows bad, unheeded,  
 What was true, — an empty word ;  
 For innate rights no voice is heard  
 Since to our fathers we succeeded.

In the original :

“ Es erben sich Gesetz und Rechte  
 Wie eine ew'ge Krankheit fort,  
 Sie schleppen vom Geschlecht sich zum Geschlechte,  
 Und rücken sacht von Ort zu Ort.  
 Vernunft wird Unsinn, Wohlthat Plage ;  
 Weh dir, dass du ein Enkel bist !  
 Vom Rechte, das mit uns geboren ist,  
 Von dem ist leider ! nie die Frage.”

Although this state of things is found to exist in almost all countries, yet, by an attentive solicitude bestowed upon the adjustment of the individual relations of the people, this great amendment, the Americans, aided by the experience of modern times, and an increasing civilization, may effect, and thereby gain a high degree of celebrity ; and the most satisfactory expectations may be entertained of the future state of its civil jurisprudence, which, from a just regard to their own interests, ought to be an object of the utmost importance to this active and enterprising people. For what greater incentive is there to industry than entire legal security ? Who would attempt the cultivation of land, if the rights of property were not protected, and the produce of the soil secured against the cupidity of the first comer ? Could industry flourish without that protection, or deprived of the hope of enjoying the fruits of its labor ? Industry and legal security mutually depend on each other. They like the soul and nerves of the human body ; working in harmony when both are in a healthy state. There-

fore the Americans should be favorably disposed towards the amendment of laws touching in such a variety of ways, and so closely, the roots of industry. They would realize in this spirit the spirit of the Roman twelve tables : *Salus publica suprema lex*. "The public welfare is the end of the law." Thus we shall be enabled to appreciate the evil effects of the uncertainty of the application, rather than want of the common law, upon the prosperity of individual industry. In the following remarks we shall point out some of the most obvious disadvantages.

As we have already had occasion to remark, the amount of legal decisions is innumerable, and is made up of a great variety of materials, which are not sufficiently digested. Lawyers and their clients, therefore, have had great difficulty to understand rightly the leading principles of the law ; although, in the daily occurrences of life, the necessity of a recourse to law is continually presented to all persons, and a certainty in its issue is of urgent necessity, but notwithstanding, impossible, without clear and precise definitions. But the abundance of these materials, so far from being viewed as an evil, should be looked upon as of great importance to the advancement of law, if care is taken to regulate and render them easy of access ; to separate the useful from the obsolete ; and to throw the crude into a more suitable shape ; just as with the precious metals, which must be sought after in the bowels of the earth, and be freed from their admixture with baser ore, before they can be applied to satisfy the wants of mankind. In the present state of the subject, the most important questions may, on the one hand, be decided by laws containing many obscurities, contradictions, and inaccuracies, creating thereby, in various ways, insecurity to possessions and property, whilst on the other hand we should remember, that in a system of jurisprudence all parts affect each other, and that consequently a contradiction can never remain isolated, but

must enter, in a variety of ways, into the intricate relations of social life, and render it impossible at all times to guard against its baneful influences. Fraud and artifice find ample nourishment in the inaccuracies and ambiguity of the laws; disputes necessarily arise from laws of doubtful meaning; and the peaceful citizen, fondly fancying himself safe, and in the possession of his manifest rights, finds it impossible to protect himself from the harassing schemes of his malicious opponent. The latter is even assisted by the laws themselves; in consequence of their internal contradiction, in his attempts to involve the former in the dubious, expensive, and dilatory uncertainty of a lawsuit, the issue of which will depend entirely upon the view which may be taken of the controverted matter, by the final authorities; and which, from the contradictory nature of the laws in question, cannot previously be ascertained with any accuracy.<sup>1</sup>

All this may easily happen with even a good case, and with lawyers and judges conscientiously performing their duty. Unjust doubts will then be frequently entertained of the science and capacities of jurisconsults; whereas it is the faulty laws alone which are to be blamed. Their amelioration, therefore, is of weighty importance to the true interests of industry, and of the law. And, furthermore, those legal institutions of the olden times of England should not be retained without great modifications, in all cases in which they may not be in accordance with the more modern American customs,<sup>2</sup> as they tend to confuse all ideas, and to naturalize much here, which was local and incidental in its nature and origin, and which is not suited to the life of America. From these remarks it will be sufficiently evi-

<sup>1</sup> Some excellent remarks on this point may be found in the *American Jurist* for October, 1834, in a "Lecture on the alleged uncertainty of the law," by John Pickering.

<sup>2</sup> Montesquieu, *de l'esprit des lois*, livre 19, chap. 21.

dent, that the obscurities, the faulty arrangements, and the contradictions of the laws, must be directly opposed to the establishment of legal security. But legal security is certainly one of the principal objects of a government which shall endeavor to realize the true end and design of its institution.

A more perfect establishment of legal security, attainable only by reasonable ameliorations of the law, being thus among the noblest and most elevated objects of government, the following questions need not excite surprise. Why have civilized nations allowed centuries to roll by without obtaining that legal security which they so earnestly desired? Were they not equal to the task, or did it exceed the capacity of their legal science?

The answer to these questions may be found in the following considerations. On the one hand the exigencies of the times have made it necessary for all nations to apply themselves principally to matters of state polity. On the other hand, in France, Prussia, and Austria, codes have been made, and in the United States, also, much has already been done for the amelioration of the private law, by careful revisions of statutes, which have admirably prepared the way for the compilation of a code which would comprehend both common and statute laws.

After the systematic compilation of the civil law and law of procedure of Louisiana, and after some alphabetical arrangements of the statutes, Messrs. Spencer, Butler, and Duer revised and codified, in 1829, the statutes of the state of New York, a work which, for its novelty and the systematic order in which it was completed, deserves the highest praise.

In 1835, Messrs. Jackson, Stearns, and Pickering, were equally successful in their systematic revision of the statutes of Massachusetts. And two years later, a commission, authorized by the legislature of the same state, and at the



head of which Mr. Justice Story was placed, in their "Report on Codification," have done great service to the country, by the clear and able manner in which they have presented to the people the expediency and practicability of codifying the common law.

But the systematic arrangement of the common and statute law, or the compilation of a code, is a measure against which many objections have been raised. We come now to the consideration of those objections, and to these we will now give a careful attention.

[The residue of this article, in which the objections against Codification are considered, will appear in the next number.]

## JURISPRUDENCE.

### I.—DIGEST OF ENGLISH CASES.

#### COMMON LAW.

Selections from 10 Adolphus & Ellis, parts 2, 3 and 4 ; 11 Same, part 1 ; 3 Perry and Davison, parts 3 and 4 ; 4 Same, part 1 ; 1 Manning & Granger, part 2 ; 8 Scott, part 2 ; 1 Scott's N. R. parts 2 and 3 ; 6 Meeson & Welsby, parts 4 and 5 ; 7 Same, part 1 ; 8 Dowling's P. C., parts 4 and 5 ; 9 Same, part 1 ; 9 Carr. & Payne, part 3.

**ACTION ON THE CASE.** (*For obstruction in highway.*) In an action to recover compensation in damages for an injury occasioned by an obstruction in a highway, it was left to the jury to say, whether or not the plaintiff was himself in any degree the cause of the injury, whether he had acted with such want of reasonable and ordinary care as to disentitle him to recover : *Held*, that the direction was proper. (11 East, 60 ; 3 M. & W. 244.) *Marriott v. Stanley*, 1 Scott, N. R. 392.

**ARBITRATION.** (*Revocation of submission by insolvency.*) Semble, the insolvency of the plaintiff does not operate as a revocation of a submission to arbitration. (4 B. & Ald. 250 ; 9 B. & C. 659 ; 8 D. P. C. 281.) *Hobbs v. Ferrars*, 8 D. P. C. 779.

2. (*Award, construction of.*) An award, dated 13th October, 1840, ordered the payment of money on "the 28th day of October next : " *Held*, on motion for an attachment, that the money was payable on the 28th of the same October in which the award was made. *Brown v. Smith*, 8 D. P. C. 857.

**ASSUMPSIT.** (*Consideration—Discharge of joint debtors.*)

Where a plaintiff discharges one of two joint debtors, the other also has a right to be discharged; and therefore, a promise by a third person to pay the debt, in order to obtain the discharge of the defendant in custody, is void for want of consideration.

*Herring v. Dorell*, 8 C. & P. 604.

**BILLS AND NOTES.** (*Notice of dishonor.*) The following is a good notice of dishonor: "I beg to inform you that A. B.'s acceptance for 200l., drawn and indorsed by you, due July 31, has been presented for payment and returned, and now remains unpaid." (2 M. & W. 799; 2 P. & D. 278.) *Cook v. French*, 3 P. & D. 596.

2. (*When suable on, in debt.*) Debt may be brought by the payee against the maker of a note, or by the drawer of a bill payable to himself against the acceptor, although the instrument expresses no consideration, either by the words "value received" or otherwise. (1 B. & C. 674; 2 D. P. C. 635; 3 D. P. C. 243; 3 Price, 253.) *Hatch v. Traves*, and *Watson v. Kighley*, 3 P. & D. 409.

**COMPUTATION OF TIME.** Where it appeared on the face of a conviction for an offence against the excise laws, that the plaintiff had been summoned on the 20th September to appear before the defendant on the 30th September following, and not appearing on that day, the defendant proceeded to hear evidence, and convicted him in a penalty of 5l.; the court held the conviction to be null and void, and the defendant liable in trespass for issuing a distress warrant, as the excise act (4 & 5 Will. 4, c. 51, s. 19) requires that "ten days' notice at least" shall be given to the party to appear, and the rule is inflexible to construe such limitation of time as ten *clear* days. *Mitchell v. Forster*, 4 P. & D. 150.

**COVENANT.** (*Joint or several.*) By articles of agreement, reciting that the defendant had contracted with J., as the agent of the plaintiff and the other owners of the property, for the purchase of the lands therein mentioned, the defendant covenanted with the plaintiff, and the several other parties beneficially

interested, to perform such contract by paying the purchase money on a certain day, &c. : *Held*, that this covenant was several, and that the plaintiff might sue alone for the non-payment of his share of the purchase-money without joining the other parties beneficially interested. *Poole v. Hill*, 6 M. & W. 835.

**DEED.** (*Reservation of right of way, construction of.*) A deed reserved to the defendant a right of way over a yard "to the stable and loft over the same, and the space or opening under the loft, and now used as a wood-house," and also the use of the yard "in common with the plaintiff and his tenants for the time being, it being the intent that the whole of the yard should lie open and undivided as the same then was, without any other building to be erected thereon, and that the yard should be used in common by the occupiers of the plaintiff's and defendant's messuages, in the same manner as the tenants thereof had been accustomed to use the same."

The defendants converted the loft and the space there used, which had been used as a wood-house, into a cottage.

*Held*, 1. That the deed did not justify the defendant in using the yard after the cottage was built, for that such user was not the accustomed user which had been reserved.

2. That the reservation of the way "to the space or opening under the loft, and now used as a wood-house," was to be taken as identifying the locality, and confining the way to a piece of open ground generally, and not specifically to a wood-house; but that the conversion of the open space to a cottage was an alteration of substance, and that the defendant had no right of way to the cottage. *Allan v. Gomme*, 3 P. & D. 581.

**EVIDENCE.** (*Admission of copy of instrument under judge's order.*) Although a judge's order has been made on the plaintiff to admit a copy of a letter from himself to the defendant, and the plaintiff has also had notice to produce the original, the copy cannot be read, unless evidence is given of the existence of the original.

Whether the notice to admit contains a saving of all just ex-

ceptions or not, the opposite party is entitled to rely on any valid objection to the documents mentioned in the notice. *Sharpe v. Lambe*, 3 P. & D. 454.

2. (*Admissibility of parol evidence.*) A witness called to prove the terms of a verbal agreement, stated that he was in company with the plaintiff and defendant when it was entered into, and referred to an entry which he made a few hours afterwards to refresh his memory. This entry was made by him from a paper written in pencil by the plaintiff, during the interview between the parties, and read by him to the defendant, as embodying the terms of their agreement. The defendant assented to it, but he neither signed nor was asked to sign it, nor was it shown to him : *Held*, that it was not necessary to produce this paper as constituting the real agreement. *Truwhitt v. Lambert*, 3 P. & D. 676.
3. (*Of handwriting.*) In an action against the acceptor of a bill of exchange, the only proof of his handwriting was that of a banker's clerk, who stated that two years ago he saw a person calling himself by the defendant's name sign a book ; that he had never seen him since, but he thought the handwriting was the same ; and that he had since seen checks similarly signed pass through the bank : *Held*, that this was evidence to go to the jury. *Warren v. Anderson*, 8 Scott, 384.
4. (*Admission of defendant.*) A parol admission by a party to a suit is always receivable in evidence against him, although it relate to the contents of a deed or other written instrument ; and even though its contents be directly in issue in the cause. (1 Ry. & M. 187 : 5 C. & P. 542.) *Slatterie v. Pooley*, 6 M. & W. 664 ; *Newhall v. Holt*, id. 662.
5. (*Secondary evidence.*) A witness, called to prove a parol demise from the plaintiff to the defendant, stated that, at the time of making it, the plaintiff looked at written minutes, from which he appeared to read the terms, to which the defendant assented : *Held*, that, in the absence of any further proof respecting the nature of the minutes, parol evidence of the terms of the demise was admissible. *Truwhitt v. Lambert*, 10 Ad. & E. 470.
6. (*Same.*) Where a deed is in the hands of an attorney, who

holds it not merely as an attorney, but as a security for money owing to him from his client, and the attorney, being called on by a subpoena *duces tecum*, refuses to produce the deed on the ground of his own lien, the party calling for the production of the deed is entitled to give secondary evidence of its contents.

There are no degrees of secondary evidence ; but where a party is entitled to give secondary evidence at all, he may give any species of secondary evidence within his power. (2 Atk. 71 ; 6 C. & P. 206.)

#### EVIDENCE IN CRIMINAL CASES. (*Dying declarations.*)

Two days before the death of the deceased, the surgeon told her she was in a very precarious state ; on the day before her death, when she had become much worse, she said to the surgeon that she found herself growing worse, and that she had been in hopes she should have got better, but as she was getting worse, she thought it her duty to mention what had taken place. Immediately after this she made a statement : *Held*, that this statement was not receivable in evidence as a declaration *in articulo mortis*, for that it did not sufficiently appear that, at the time of making it, the deceased was without hope of recovery. *Reg. v. Megson*, 9 C. & P. 418.

**FIXTURES.** (*Removal of, by tenant after his term.*) The right of a tenant to remove tenant's fixtures continues only during his original term, and during such further period of possession by him as he holds the premises under a right still to consider himself as tenant.

Where, therefore, the term, pursuant to a proviso in the lease, was forfeited by the bankruptcy of the lessee, and the lessor entered upon the assignees, in order to enforce the forfeiture, and three weeks afterwards the assignees of the lessee, still continuing in possession, removed and sold a fixture put up by the lessee for the purposes of trade ; and the jury found that it was not removed within a reasonable time after the entry of the lessor : *Held*, that they had no right so to remove it, and that the lessor might recover it in trover.

And *semble* such would have been the case even without such

finding of the jury. (2 East, 81 ; 1 C. M. & R. 275 ; 2 M. & W. 458.) *Weeton v. Woodcock*, 7 M. & W. 14.

**GUARANTEE.** The case of *Haigh v. Brooks*, 10 Ad. & E. 309, 2 P. & D. 477 (23 L. M. 162,) was affirmed on error in the exchequer chamber. *Brooks v. Haigh*, 10 Ad. & E. 323.

2. (*When continuing.*) "In consideration of your supplying my nephew V. with china and earthenware, I guarantee the payment of any bills you may draw on him on account thereof, to the amount of £200 : *Held*, a continuing guarantee, and that the defendant was liable upon it, although, after it was given, goods to a greater amount than £200 had been supplied to and paid for by V. (12 East, 227 ; 2 Campb. 412 ; 3 Camp. 220 ; 2 C. & J. 13 ; 6 Bing. 244 ; 9 Bing. 618 ; 1 C. & M. 68. *Mayer v. Isaac*, 6 M. & W. 605.

**HUSBAND AND WIFE.** (*Right of husband to restrain liberty of wife.*) Where a wife absents herself from her husband, not on account of any misconduct on his part, and he afterwards, by stratagem, obtains possession of her person, and she declares her intention of leaving him again whenever she can, he has a right to restrain her of her liberty until she is willing to return to a performance of conjugal duties. *In re Cochrane*, 8 D. P. C. 630.

2. Goods bought by a married woman out of the proceeds of property vested in trustees for her sole and separate use, may be taken in execution on a judgment against her husband. (Vin. Abr., Baron & Feme, F. 2.) *Carne v. Brice*, 8 D. P. C. 884.

**INDICTMENT.** (*Statement of property in goods.*) Where a party has been convicted of felony and is in prison under his sentence, and his wife continues in the possession of his house and goods, an indictment for breaking into the house and stealing the goods, laying the property in the goods in the queen, may be sustained as to the larceny ; but a count for breaking the house and stealing the goods, laying them to be the house and goods of the wife, cannot be supported. *Reg. v. Whitehead*, 9 C. & P. 429.

**LIBEL.** (*Province of judge and jury in action for.*) It is com-

petent to a judge, in an action for libel, to leave the question to the jury, without stating his opinion as to whether the publication amounts to a libel or not. (6 M. & W. 105.) *Baylis v. Lawrence*, 3 P. & D. 526.

2. (*Publication.*) If the manuscript of a libel be proved to be in the defendant's handwriting, and it be also proved to have been printed and published, this is evidence to go to the jury that it was published by the defendant, although there be no evidence given to show that the printing and publishing were by the direction of the defendant. (2 Stark. Evid. 454; 1 Ld. Raym. 414; 9 Rep. 59.) *Reg. v. Lovett*, 9 C. & P. 462.

**MALICIOUS PROSECUTION.** A declaration for maliciously indicting and procuring the plaintiff to be indicted, is sustained, although it appear that the defendant preferred the indictment unwillingly, and solely because he was bound over to do so, if it appear that he was himself the cause of his being so bound over, by originally making a malicious charge before the magistrate. *Dubois v. Keats*, 3 P. & D. 306.

**MASTER AND SERVANT.** Where the master has intrusted his servant with the control of his carriage for the purpose of putting it up in a certain place, but the servant, instead of doing so, takes it another way for a purpose of his own, and in so doing negligently injures a person by driving against him, the master is liable for that injury. (6 C. & J. 501.) *Sleath v. Wilson*, 9 C. & P. 607.

**PARTICULARS.** In an action for a breach of warranty of a horse, the court will not compel the plaintiff to give particulars of unsoundness. *Pyllie v. Stephen*, 8 D. P. C. 771.

**PARTNERSHIP.** (*Liability of partners on contract antecedent to the partnership.*) The plaintiff sued three defendants, partners, on a bill of exchange, given in the name of the firm. The contract on which the amount of the bill accrued due was entered into before the partnership of one of the defendants, but a part of the debt, the consideration of the bill, was incurred afterwards: *Held*, that the plaintiff was entitled to recover against all three defendants for the amount of the debt so incurred after



the commencement of their partnership. *Wilson v. Bailey*, 9 D. P. C. 18.

**PERJURY.** A. was indicted for perjury, alleged to have been committed on the trial of B. for perjury. The indictment against A. alleged that the evidence he gave on the trial of B. was material, and that B. was convicted. It appeared that B. was convicted and sentenced, but that the judgment was afterwards reversed on error: *Held*, that this reversal was no ground of defence for A., as showing that his evidence could not have been material, and that it did not negative the allegation that B. had been convicted. *Reg. v. Meek*, 9 C. & P. 513.

**PRIVILEGES OF PARLIAMENT.** The house of commons has power to commit for contempt and breach of the privileges of the house, under a warrant, stating generally that a contempt, &c. has been committed, without setting out the particulars of the contempt. Where, therefore, a committal under such warrant is returned to a *habeas corpus*, the courts of law cannot discharge the prisoner.

*Quere*, whether a prisoner so committed can be discharged by the courts of law, if the particulars of the alleged contempt are set out in the warrant, and are deemed insufficient.

Where a committal by the house of commons, under such a warrant, is returned to a writ of *habeas corpus*, the 56 Geo. 3, c. 100, s. 3, does not apply so as to enable the courts of law to inquire into the existence of the contempt alleged.

To a writ of *habeas corpus*, the serjeant-at-arms of the house of commons returned a committal under the following warrant: "Whereas the house of commons has this day resolved that A. having been guilty of a contempt and breach of privilege of this house, be committed to the custody of the serjeant-at-arms attending this house, these are therefore to require you to take into custody the body of A., and him safely keep during the pleasure of this house, for which this shall be your sufficient warrant. C. S. L. speaker:" *Held*, that there was a sufficient adjudication that A. had been guilty of a contempt; and that it sufficiently appeared that the contempt committed had been

against the house of commons, and that the house had authorized the speaker to issue the warrant. *Reg. v. Gossett*, 3 P. & D. 349.

**RAPE.** (*Indictment.*) An indictment for rape charged that the prisoner in and upon E. F. feloniously and violently did make (omitting the words "an assault,") and her the said E. F. then and there, against her will, feloniously and violently did ravish and carnally know, &c.: *Held* good, in arrest of judgment. *Reg. v. Allen*, 9 C. & P. 521.

**REWARD.** (*Action for reward promised by advertisement.*) The defendant, who was sued for a reward promised by advertisement to any person who would give such information as would lead to the conviction of those concerned in a burglary in his (defendant's) house, pleaded that the plaintiff was policeman of the district where the house was, and therefore it was his duty to give information without reward: *Held*, on demurrer, that the information might have been supplied under such circumstances as that the plaintiff had done more than his ordinary duty required, and that therefore he was entitled to judgment. *England v. Davison*, 3 P. & D. 594.

**SHERIFF.** (*Action against, for false return, when waived.*) Where, after a return to a *fi. fa.* that part only of a debt has been levied, and that the debtor has not goods whereon the whole can be levied, the creditor accepts that part on account, he does not thereby waive his right of action for a false return. (Overruling *Beynon v. Garrat*, 1 C. & P. 154.) *Holmes v. Clifton*, 10 Ad. & E. 673; 4 P. & D. 112.

**SHOOTING.** If a person, intending to shoot another, put his finger on the trigger of a loaded pistol, but is prevented from pulling the trigger, this is not an attempt to discharge loaded arms, within the stat. 1 Vict. c. 85, ss. 3, 4.

If a person present a pistol, purporting to be loaded, at another, so near as to have been dangerous to life, if the pistol, being loaded, had gone off, this is an assault in law, though the pistol were not in fact loaded.

On an indictment for a felony, which includes an assault, the

prisoner ought not to be convicted of an assault distinct from the felony charged, but only of an assault involved in the felony itself. *Reg. v. St. George*, 9 C. & P. 483; see also *Reg. v. Lewis*, ib. 523.

**TENDER:** Where a party sent to make a tender said to the plaintiff, "I am instructed by the defendant to say that 15*l.* is more than is due, but you may have it," and produced that sum: Held, a good tender. *Thorpe v. Burgess*, 8 D. P. C. 603.

**TRESPASS.** (*Description of close.*) The owner of a close called Hall Close, removed an old fence and added to his close a small slip of land adjoining a public road.

In an action for an alleged trespass committed upon this slip of land a year after the enclosure, the plaintiff in his declaration described the *locus in quo* as Hall Close: Held, that it was well described. *Brownlow v. Tomkinson*, 1 Scott, N. R. 426; 8 D. P. C. 287.

2. (*For continuing injury.*) Trespass is the proper remedy for wrongfully continuing a building on the plaintiff's land, for the erection of which the plaintiff has already recovered compensation: and a recovery, with satisfaction, for erecting it, does not operate as a purchase of the right to continue such erection.

Therefore, where trustees of a turnpike road built buttresses to support it on the land of A., who thereupon sued them and their workmen in trespass for such erection, and accepted money paid into court in full satisfaction for such trespass: Held, that after notice to the trustees to remove the buttresses, and a refusal to do so, A. might bring another action of trespass against them for keeping and continuing the buttresses on his land, and that to such action the former recovery was no bar. (1 Stark. 22; 1 Saund. 24; 2 Ld. Raym. 976; 5 M. & W. 337.) *Holmes v. Wilson*, 10 Ad. & E. 503.

**VENDOR AND PURCHASER.** (*Action for non-completion of purchase of land—Measure of damages.*) In an action for the non-completion of a contract for the purchase of land, the measure of damages is, not the amount of the purchase money, but only such damage as the plaintiff has actually sustained by the breach of contract. *Laird v. Pyne*, 8 D. P. C. 860.

2. (*Whose duty to tender conveyance.*) A declaration in covenant by the vendor against the intended purchaser of lands, for non-payment of the purchase-money according to the contract, need not aver that the plaintiff offered or tendered a conveyance to the defendant; it is sufficient to allege that the plaintiff has always been ready and willing to execute a conveyance: inasmuch as, in the absence of an express stipulation to the contrary, it is the duty of the purchaser to prepare the conveyance, and tender it to the vendor for execution. (Forrest, 61; 6 M. & W. 6.) *Poole v. Hill*, 6 M. & W. 835.

WITNESS. (*Competency.*) Ejectment by first mortgagee against mortgagor; defence, that the mortgage was fraudulent; the second mortgagee, called as a witness to prove the fraud, was held to be rightly rejected as incompetent. (3 Bing. N. C. 429.) *Doe d. Cuthbert v. Bamford*, 3 P. & D. 498.

2. (*Competency of surety.*) In an action by the payee against one of three makers of a joint and several promissory note, another of the makers was called as a witness for the plaintiff, and stated on his examination on the *voir dire*, that the note had been given by the defendant as principal, and that it was signed by himself and the other maker as sureties: Held, that the witness was competent. *Page v. Thomas*, 6 M. & W. 733.

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#### EQUITY.

Selections from 2 Beavan, parts 1 and 2; 4 Mylne & Craig, part 2; 9 Sim. part 4; 10 Same, part 1.

AGREEMENT. (*In restraint of partition.*) Four persons bought some land with the view of selling it in lots as building ground according to a specified plan, and agreed that none of the four should dispose of his share except in a certain manner: Held, in a suit by the representatives of one of the four against the survivors, that the agreement barred the right to a partition. *Peck v. Cardwell*, B. 137.

**BREACH OF TRUST.** (*Liability of third party.*) The obligor of a bond, which had been afterwards assigned to a trustee, of which assignment the obligor of the bond had notice, but not of the particular terms of the trust, was held not liable for payments not warranted by the trust made by him under the direction of the trustee, but only for such payments as he had made against the trust and without such direction. *Roberts v. Loyd*, B. 376.

**CHARGE.** (*Power of sale—Personal liability.*) Testator gave lands to A., upon trust to pay to his (testator's) widow an annuity of 28*l.*, and after her death to A. and his heirs, with power to the widow to sell, if the annuity was in arrear. At the time of testator's death A. was and afterwards continued in possession of the land. The rent was insufficient to pay the annuity. Held, that A. was not personally liable for the arrears, but that the widow might compel a sale. *Button v. Button*, B. 256.

**CHARITY.** (*Account—Discretion.*) The court has a discretion in giving or refusing an account in charity cases; and in a case where a sufficient ground was laid for an account, but the amount in question was small and insufficient to meet the expenses of the inquiry; the court affirming an order made on a previous hearing before lord Cottenham as master of the rolls, refused the account. *Attorney General v. Shearman*, B. 104.

2. (*Cy-pres.*) Testator bequeathed 1000*l.* to "The Jews' Poor, Mile End;" there was no charity known by that name, but there were two charitable institutions for the Jews at Mile End. The legacy was divided between them. *Bennett v. Hayton*, B. 81.

3. (*Cy-pres.*) Where there is only a partial failure of the objects of a charity, the court, in applying the principle of *cy-pres* to that part of the fund which has been so released, will take into consideration the intention of the testator as shown in the other charitable trusts. Accordingly where the purpose that failed was the redemption of British slaves in Barbary, and one of the other objects was the endowment of schools in London and its suburbs, the master of the rolls having referred it back to the master to select a scheme *cy-pres* with reference to the other

objects of the will, the lord chancellor on appeal, affirming the principle above stated, directed the released fund to be applied in support of charity schools in England generally. *Attorney General v. The Ironmonger's Company*, B. 313.

**CONSTRUCTION.** (*Assignment of copyright.*) An author assigned to trustees, subject to a life interest in himself in the present and any new editions, the copyright of certain books, and the copies then on hand, upon trust to permit his son to manage and conduct the printing, publishing, and disposing of the said printed and manuscript books, and the copies thereof: *Held*, that the copies printed after the date of the deed, in the lifetime of the father, passed by the assignment. *Rippon v. Norton*, B. 63.

2. (*Marriage covenant.*) By settlement made on the marriage of a lady who was possessed of funded property and shares in water works, trusts were declared of the funded property alone, but there was a covenant to settle upon the same trusts all the property that the wife, or the husband in her right, might become entitled to: *Held*, that the shares were included in this covenant. *James v. Durant*, B. 177.

3. (*Agreement.*) A husband went abroad leaving his wife and child unprovided for, whereupon the father of the husband and the father of the wife entered into an agreement to allow the wife 30*l.* each so long as she should continue separate and apart from her husband: *Held*, that the allowance was determined by the death of the husband. *Miller v. Woodward*, B. 271.

**CONTEMPT.** (*Libel on parties.*) Pending a suit, violent attacks were published in a periodical paper upon the plaintiff and his witnesses, imputing to them respectively malice and perjury: *Held*, that this was a contempt in the editor of the paper. *Littler v. Thompson*, B. 129.

**COPYRIGHT.** (*Extent of injunction.*) Where some only of the parts alleged to be piratical of the work of the defendant were produced in evidence, but they were such as to justify the presumption that the general character of the work was piratical, the court made an injunction restraining the defendant "from

printing, &c. any copy of his work containing any articles copied or taken or colorably altered from the work of the plaintiff."

*Lewis v. Fullarton*, B. 6.

2. (*Subject of.*) A work made up partly of compilations, partly of information the result of original inquiry, such as a topographical dictionary, may be the subject of copyright. *Ib.*

**FOREIGN CONTRACT.** (*General principle—Bill of exchange.*)

The general principle is, as to contracts merely personal, that their construction is governed by the law of the country where they were made, the consequences of their breach, by that of the country where they are enforced.

A bill of exchange drawn and accepted in France, but made payable in England, and with no stipulation as to interest, was held to carry English interest only. *Cooper v. The Earl of Waldegrave*, B. 282.

**HUSBAND AND WIFE.** (*Affidavit.*) Where the husband resided in one of our African colonies, the affidavit of the wife alone, of their being no settlement, was admitted as ground for an order to transfer her property to a purchaser, in pursuance of a contract made by the husband while it was yet in reversion. *Elliott v. Remington*, S. 502.

2. (*Separation—Fund in court.*) A husband having, without sufficient cause, separated from his wife, leaving her unprovided for, three-fourths of a fund in court bequeathed to the wife were, without a reference, ordered to be settled upon her and her issue generally, the remaining fourth to be paid to the husband. *Coster v. Coster*, S. 606.

3. (*Agreement—Provision—Power.*) A wife having an estate for life for her separate use in lands, with an absolute power of appointment over the reversion, joined her husband in an agreement to execute a mortgage: *Held*, that such agreement was binding on the wife surviving. *Stead v. Nelson*, B. 245.

**INTEREST.** (*Implied contract.*) The defendant wrote to his receiver and professional agent, "If you will remit the 400*l.*, I can give you a note for it when you come to London;" the money was remitted, but no note given: *Held*, that a special

contract must be implied, and interest was allowed. *Rhoades v. Lord Selsey*, B. 359.

**MARRIAGE SETTLEMENT.** (*Reformation.*) Where the proposals previous to marriage were that the father of the wife should make an allowance to her of 200*l.* a year during her life, and if she died leaving children, then to her children during life of wife's father, and if she died without issue, an allowance of 150*l.* to be made to the husband, and the settlement, by mistake, gave to the husband the 200*l.* absolutely during his life, the settlement was, upon his insolvency, corrected by reference to the proposal. *Pearse v. Verbeke*, 333.

**PARTNERSHIP.** (*Jurisdiction—Preservation of property.*) The court has, it seems, jurisdiction to interfere for the preservation of the property of the partnership, even where a dissolution is not sought; but it refused to restrain some members of a company from sending a ship belonging to the company upon a voyage not sanctioned by the committee. *Miles v. Thomas*, S. 607.

**POWER.** (*Defective execution.*) Where the instrument conferring the power required it to be executed "by any deed or deeds under the respective hands and seals (of the donees) to be by them executed in the presence of and attested by two or more credible witnesses," and the form of attestation was "sealed and delivered in the presence of," nothing being said about signing: *Held*, that by reason of such omission the execution was invalid. *Waterman v. Smith*, S. 629.

**PRACTICE.** (*Examination "de bene esse."*) An *ex parte* order for the examination "*de bene esse*" of a witness stated to be "in her seventieth year, and very weak and infirm, and not likely to live long," discharged—the rule as to age requiring "full seventy years," and as to health, &c. a state of actual danger. *McKinner v. Everitt*, B. 188.

2. (*Subpœna duces tecum.*) Where the *subpœna* required a witness to produce all books and accounts in his power relating to the disposal of a particular sum, and also all books and accounts relating to the matters in question in the suit, the description



was held too general, and upon this ground, and also because the witness was only a partner, and deposed that his co-partners would not consent to the production of the books, a motion founded on the *subpoena* was dismissed with costs. *Attorney General v. Wilson*, S. 527.

**PRODUCTION OF DOCUMENT.** (*Books in use.*) Where a defendant states in his answer, that books which the plaintiff is entitled to see are in constant use and necessary in his business, they will be ordered, in the first instance, to be produced at the defendant's residence or place of business. *Grane v. Cooper*, M. & C. 263.

**SALE UNDER DECREE.** (*Bidding without leave.*) Though a party in the cause is not entitled to bid without leave, he will not be treated with the same strictness as assignees in bankruptcy attempting to purchase the bankrupt's property; consequently, where a party had bid without leave and become a purchaser, a motion that the estate should be put up again at the price for which he bought it, and that if it fetched more the sale should be set aside at the cost of the party who had so purchased, was refused. *Elworthy v. Billing*, S. 98.

**SOLICITOR.** (*Costs in cases of trust.*) Where one of two partners was a trustee under a will: *Held*, that the firm could only charge the testator's estate for costs out of pocket. *Collins v. Carey*, B. 128.

2. (*Taxation of bill.*) Where a party became liable on his marriage to pay a bill of costs incurred partly by his wife before marriage, and partly by her first husband, he was held entitled to have such bill taxed though he had not stood in the relation of client to the solicitor. *Waring v. Williams*, B. 1.

**SOLICITOR AND CLIENT.** (*Privileged communication.*) Communications made through a third person, from a client to a solicitor, are privileged, if otherwise entitled to be so. *Bunbury v. Bunbury*, B. 173.

2. (*Same case for foreign counsel.*) A case submitted since the institution of the suit to a Dutch lawyer was held privileged. *Ib.*

**SPECIFIC PERFORMANCE.** (*Supplemental suit—Damages.*)

*Held* that a party who had obtained a decree for a specific performance might obtain by supplemental suit compensation for damage done to him, by abstraction (by the defendant) *pendente lite* of part of the subject matter of the original suit; the amount of damage to be assessed in an action brought under the direction of the court. *Nelson v. Bridges*, B. 289.

**VENDOR AND PURCHASER.** (*Time of performance—Costs.*)

Where time is not the essence of the contract, by its original terms, it may be made so on reasonable notice by either party; but where an objection founded on such a notice is set up and fails, the defendant will have to pay the costs up to the hearing. *Taylor v. Brown*, B. 180.

**WILL.** (*Construction—Legal representatives.*) There being a bequest to A. or his legal representatives, A. being dead at the date of the will (which the testator did not know): *Held*, that A.'s next of kin, according to the statute of distribution, were entitled, to the exclusion of his legatees or executors. *Cotton v. Cotton*, B. 67.

2. (*Construction—Partial restraint on alienation.*) Bequest of money and leaseholds to a *feme sole* "for her own absolute use, without liberty to sell or assign during her natural life:" *Held* to confer an absolute interest without power of alienation during life. *Baker v. Newton*, B. 112.

3. (*Construction—Payment of legacies.*) Where legacies given by will were made payable at twenty-one: *Held*, that the payment of them was not accelerated by a direction in a codicil to pay all legacies as far as practicable within six months. *Frost v. Capel*, B. 184.

4. (*Construction—Period of survivorship.*) Testator gave to his wife for life all his remaining estates and also all his capital in trade in trust at his death for his then surviving children, except as to the rental of his estates, which he gave to his surviving female children, subject to certain restrictions, with a gift over (from one to the other) upon the decease of any of the children without issue, and from the last female child to the males in like

manner: *Held*, that the surviving female children meant the children surviving his wife. *Wordsworth v. Wood*, B. 25.

5. (*Construction—Separate use.*) Bequest in trust to pay income to testator's wife for her life, to be by her applied for the maintenance of herself and children by the testator: *Held*, not to be a gift to the separate use. *Wardle v. Claxton*, S. 524.
6. (*Absolute interest—Remoteness.*) Where there was a bequest of personalty, in terms giving an absolute interest in the first instance to the testators, followed by a direction to invest in trust for them for life, with a remainder to their children that was too remote, it was *held*, that the absolute gift was not cut down by the subsequent direction. *Ring v. Hardwick*, B. 352.
7. (*Construction.*) Testator gave 600*l.* to be applied in payment of the debt to which Z. chapel was or might be subject at his death. At that time, by arrangement among the body of dissenters with which the chapel was in connexion, 600*l.* was laid on the congregation belonging to that chapel, but there was no legal charge affecting the chapel: *Held*, that the legacy failed. *Davies v. Hopkins*, B. 276.
8. (*Construction—interest—share.*) Bequest to trustees to be divided between the testator's wife and six poor members of a chapel: *Held*, that the wife had a seventh absolutely, and that the interest only of the other six-sevenths was payable to the six poor members *in perpetuam*. *Gregory v. The Attorney General*, B. 366.
9. (*Cumulative legacy.*) A testator bequeathed to A. B. an annuity of 150*l.* half-yearly, for her separate use, afterwards, on hearing that she was married, (as she was at the time of the original bequest), he wrote on the margin of the will opposite the above passage, "now Mrs. C. D., one hundred guineas per annum, in quarterly payments," which he signed. The two handwritings were proved separately: *Held* nevertheless that the annuity of one hundred guineas was in substitution for the other, and that this was given to the separate use. *Martin v. Drinkwater*, B. 215.
10. (*Remoteness.*) A devise in these words, "to all and every

my grandchildren, the children of my said son A., and three daughters, B., C., and D., who shall attain the age of twenty-four years : " *Held* void, for remoteness, although there were no grandchildren, not born in the testator's life time. *Newman v. Newman*, S. 51.

11. (*Specific legacy—Word "his."*) Testator bequeathed as many of his canal shares as he should leave children him surviving, one share for each child, "at the date of his will, he had eight shares and seven children ; at his death, ten shares and eleven children : " *Held*, that the eight shares only passed. *Miller v. Little*, B. 259.

12. (*Vesting of legacies—Time of payment.*) Where there was first a distinct gift of a legacy, and then a direction that it should be paid within six months, and a general declaration that all legacies should be vested only when payable, and the legatee died within the six months : *Held*, that the legacy had vested. *Lucas v. Carline*, B. 367.

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#### ADMIRALTY.

Selections from 3 Haggard, part 2.

**ADMIRALTY.** (*Office and jurisdiction of lord high admiral—Droits.*) The origin and limits of the office and jurisdiction were fully considered, and it was decided, that it begins on the coast of the kingdom regularly at low water mark, and obtains, alternately within the land jurisdiction, whether by common law or grant, over the space between high water mark and low water mark, and it was the opinion of the court, that a grant to a private person in derogation of these limits was void.

The limit of three miles below low water mark is a territorial limit between nation and nation. *The King v. Forty-Nine Casks of Brandy*, 257.

**BOTTOMRY.** (*Purchaser of bond without notice.*) A public advertisement for sale of a bottomry bond does not discharge a

purchaser from the obligation to inquire into the fact of "an unprovided necessity." *Prince of Saxe Cobourg*, 387.

**COLLISION.** (*Close hauled and free—Costs.*) A vessel close hauled, and which ought therefore to have held on, in order to get out of the way of a vessel going free, which had neared her without altering her course, attempted to wear, and was run down by the other vessel, who had changed her course at the same time: *Held*, according to the opinion of the trinity master, that the collision was imputable to the former vessel; but the other vessel not having endeavored to assist after the accident, the owner was condemned in the costs. *Celt*, 321.

2. (*Different tacks.*) If two vessels are beating to windward on opposite tacks, it is the duty of the one on the starboard tack to hold on, and of the other to give way. *Jupiter*, 320.

3. (*Steamer.*) Principles applicable to steamers. Full amount of damages and costs given against steamer who was going in a fog with unabated speed in a track frequented by coasters, and who did not, when hailed, immediately back her engines. *Perth*, 414.

**WRECK OF THE SEA.** (*What passes by the words.*) A grant of wreck of the sea does not include what is commonly called *flotsam*, which is droits, but it does include, 1, goods found at low water, between high and low water mark; 2, goods, between the same limits, partly resting on the ground, but still moved by the water. *The King v. Forty-Nine Casks of Brandy*, 257.

2. (*Same.*) The same point was decided the same way, and it was also held, as to goods which have touched the ground, but have been again floated by the tide, and are within low water mark, that the right of the grantee of wreck of the sea, will depend upon circumstances, as whether they were seized by a person wading, or swimming, or in a boat. *The King v. Two Casks of Tallow*, 294.

## II.—DIGEST OF AMERICAN CASES.

Selections from 1 Metcalf's and 19 Pickering's (Massachusetts); and 21 and 22 Wendell's (New York) Reports.

**ACCORD AND SATISFACTION.** (*By one partner.*) The acceptance of the note of a third person from one of the members of a firm, indorsed by him, together with the payment of the balance of the account against the firm in cash, is an accord and satisfaction of the demand against the firm; there being no agreement that such note was received merely as collateral security. *Frisbie v. Larned*, 21 Wendell, 450.

2. (*Same.*) So a judgment confessed by one of the partners for the debt of the firm is a satisfaction. *Ib.*

**ACTION.** The provision in the Rev. Sts. c. 118, § 42, that "when any pecuniary forfeiture or fine is made recoverable by bill, plaint or information, it may nevertheless be sued for and recovered by an action of debt or an action of trespass on the case," relates only to forfeitures and fines to be prosecuted for in forms adapted to criminal proceedings, where the suit is brought by the Commonwealth, or by a common informer. *Wiley v. Yale*, 1 Metcalf, 553. *Colburn v. Swett*, *ib.* 236.

2. (*By inference.*) As a general rule, a common informer cannot maintain an action for a penalty, unless power is given to him for that purpose by statute. *Ib.*

3. (*Corporation.*) When an action is commenced and prosecuted by a corporation, by direction of its officers *de facto*,—no other persons claiming a right to act as its officers,—the defendant cannot be permitted to show, for the purpose of procuring the action to be dismissed, that those officers were illegally elected. (1 Hall, 191.) *Charitable Association, &c. v. Baldwin*, 1 Metcalf, 359.

**ACTION ON THE CASE.** (*Preparing plaintiff's medicines.*)

If a druggist prepares a certain kind of medicine and designates it by the name of a superior medicine, invented, prepared, and sold by the plaintiff, and sells it as and for the medicine prepared by the plaintiff, the plaintiff may maintain an action against him without proof of special damage. *Thomson v. Winchester*, 19 Pickering, 214.

2. (*Same.*) Where certain medicines are designated by the name of the inventor, as a generic term, descriptive of a kind or class, the inventor is not entitled to the exclusive right of compounding or vending them, unless he has obtained a patent therefor; and if another person prepares such medicines of an inferior quality, and sells them, and by this means all medicines of that class are brought into disrepute, such inventor can maintain no action for any loss sustained by him in consequence thereof, unless they are sold as and for medicines prepared by him. *Id.*

**ADDITION.** When in an indictment against a woman, she is described as A. B. "wife of C. D." these latter words are mere addition, or *descriptio personæ*; and it need not be proved, on the trial, upon the plea of not guilty, that she is such wife. If such addition be wrong, it must be excepted to by plea in abatement. *Commonwealth v. Lewis*, 1 Metcalf, 151.

**APPRENTICE.** (*Right to service of.*) Where the plaintiff put his apprentice into the service of another person exercising the plaintiff's trade, for a short time, on wages to be paid to the plaintiff, and during that period the apprentice absconded and went to sea, it was *held*, that by such transfer of the apprentice the plaintiff's right to his services was suspended, and that it did not revive upon his absconding, so as to entitle the plaintiff to his earnings on the voyage. *Ayer v. Chase*, 19 Pickering, 556.

**ARBITRAMENT AND AWARD.** A submission was made to the arbitration of three persons, with an agreement that their award, or the award of a majority of them, should be final: All the arbitrators met and heard the parties, but after consulting together at different times, and not agreeing on an award, one of them told the others that he should not sit with them again.

The two others afterwards met and made an award, without requesting the attendance of the third, or giving him notice. *Held*, that the award was valid. *Carpenter v. Wood*, 1 Metcalf, 409.

**ARBITRATION AND AWARD.** (*Authority.*) In a submission between an insurance company and a party assured, in respect to a loss, and an award of a sum of money to the assured, the arbitrators will be deemed not to have exceeded their authority in directing a transfer by the assured of his claims against another company for a loss, as the legal intendment is, that there was a double insurance. *Nichols v. The Rensselaer County Mutual Ins. Co.* 22 Wendell, 125.

2. (*Offer to perform.*) Upon such an award, it is not necessary that the assured should aver an offer of performance on his part, if there be no necessary connection between the act to be done by him, and the payment of the money, or if the part of the award which directs the assignment be void; if both parts of the award be valid, each party is entitled to an action for the default of the other. *Ib.*

3. (*Doing of mutual acts.*) If an award directs the performance of acts by both parties, and the award as to the acts to be done by one of the parties is void, and the void part is the consideration or recompense of the thing awarded on the other side, the whole award fails; whether an offer to perform the part of the award void for uncertainty, or because out of the submission, would remove the objection, *quere.* *Ib.*

4. (*Same.*) To bring a case, however, within the above rule, it must be manifest that the act directed to be performed by one party in respect to which the award is bad, is the consideration of the act to be performed on the other side; every intendment being in favor of the award. *Ib.*

**ARREST.** (*Privilege from.*) Where a party entitled to freedom from arrest while returning from court, went to a place out of the direct route to his home, for the purpose of attending the funeral of his son, it was *held*, that he had forfeited his privilege. *Chaffee v. Jones*, 19 Pickering, 260.



**ASSUMPSIT. (*By tenant in common.*)** After one tenant in common has obtained partition by legal process, he may maintain an action of assumpsit against his former cotenant to recover his share of the rent received by such cotenant on a demise by him of the whole estate, before and during the pendency of the process for partition; although such cotenant appeared and pleaded to the petition for partition that the petitioner was not seized of said estate as tenant in common thereof. *Manroe v. Luke*, 1 Metcalf, 459.

2. (*Against subscribers to a company.*) Several members of an unincorporated religious society mutually agreed in writing to take and pay for the number of shares affixed to their names, in the stock of a meetinghouse which they proposed to build, and to pay a certain sum on each share to such person as the majority of share holders present at a meeting to be held for that purpose should elect as a treasurer; such treasurer to give bond, with sureties, for fidelity, &c., and to pay over the money received by him to the treasurer that should be elected by the share holders when they should be organized under an act of incorporation, which they intended to obtain. A. subscribed for shares in said stock, and B. was chosen treasurer, and gave bond as provided for in said agreement of the subscribers. The subscribers afterwards obtained an act of incorporation, organized under it, and chose C. treasurer. A. refused to pay the sum which he had subscribed, and B. brought an action against him to recover the same. *Held*, that there was a sufficient consideration for A.'s promise, and that the action thereon was rightly brought by B. *Thompson v. Page*, 1 Metcalf, 565.

3. (*Term of credit.*) Where goods are sold to be paid for by a note or bill, payable at a future day, which is not delivered according to the terms of sale, the vendor may sue immediately for a breach of the special agreement and recover as damages, the whole value of the goods, allowing a rebate of interest during the stipulated credit; he cannot, however, maintain assumpsit on the common counts until the credit has expired. *Hanna v. Mills*, 21 Wendell, 90.

4. (*Same.*) Where goods are to be paid for in a note or bill, the vendor cannot recover on the common count for goods sold and delivered until the credit has expired ; but he may proceed immediately for a breach of the special agreement. *Yale v. Coddington*, 21 Wendell, 175.
5. (*Money had and received.*) The plaintiff may give in evidence, under a count for money had and received, a promissory note due when the action was commenced, but which, at that time, he did not intend to include in the action. *Webster v. Randall and Tr.* 19 Pickering, 13.
6. (*Substitution.*) An agent to collect a debt, if with the consent of the debtor he credits it to his principal as paid, and charges it in his private account to the debtor, may maintain assumpsit for money paid, or money had and received, against the debtor, although in fact there was no payment or receipt of money. *Emerson v. Baylies*, 19 Pickering, 55.
7. (*Defect in quantity of land.*) Where a parcel of land represented as containing fifteen acres, was sold for \$5.05 by the acre, but the vendor's deed set forth, that in consideration of the payment of the sum of \$75.75, he thereby conveyed to the vendee the parcel in question, "containing fifteen acres," described by metes and bounds, and there proved to be a deficiency in the quantity of the land, it was held, that the vendee could not recover back any portion of the consideration paid, all prior proposals and stipulations being merged in the deed. *Williams v. Hathaway*, 19 Pickering, 387.
8. (*Same.—Promise.*) A subsequent promise by such vendor, that, if there should be a deficiency in the quantity of the land, he would make it right, is void, as not being founded on a sufficient legal consideration. *Ib.*
9. (*Moral obligation.*) In order that a moral obligation may constitute a valid consideration for an express promise, there must have been some preëxisting legal consideration. *Dodge v. Adams*, 19 Pickering, 429.
10. (*Same.*) Where the defendant's minor children were taken from his house without his consent and without any neglect

on his part to provide for them, and were boarded by his wife's father during the pendency of a libel filed by her for a divorce, and the defendant, after the board had been furnished, promised to pay therefor, it was *held*, that the promise was not binding for want of a sufficient consideration. *Ib.*

**ATTORNEY.** (*General authority of.*) An attorney who prosecutes a suit to judgment, has not power by virtue of his general authority to discharge a defendant from arrest on a *ca. sa.* without the actual payment of the debt. *Simonton v. Barrell*, 21 Wendell, 362.

**AUCTIONEER.** (*Delegation of power by.*) An auctioneer cannot delegate his power to sell by auction; but he may employ another person to use the hammer and make the outcry under his immediate direction and supervision; nor will his occasional absence during the sale subject his servant or substitute to the penalties of the statute against selling by auction without a license. *Commonwealth v. Harnden*, 19 Pickering, 482.

**AWARD.** (*Performance of.*) If one of the parties to an unauthorized award performs it on his part, and the other party accepts such performance, the latter thereby ratifies the award and is bound to perform it on his part. *Culver v. Ashley*, 19 Pickering, 300.

2. (*Same.*) After one of the parties has received the benefits of such an award, it seems he cannot repudiate it on the ground that he ratified it in ignorance of the facts, unless he can and does restore the other party to as good a situation as he was in before the ratification. *Ib.*

3. (*Submission en pais.*) An award upon a submission *en pais*, cannot be accepted in court, as the basis for a judgment. *Shearer v. Mooers*, 19 Pickering, 308.

**BAILMENT.** (*Innkeepers.*) An innkeeper is responsible for the safe-keeping of a load of goods belonging to a traveller who stops at his inn for the night, if the carriage containing the goods be deposited in a place designated by the servant of the

innkeeper, although such place be an open unenclosed space near the public highway. *Piper v. Manny*, 21 Wendell, 282.

2. (*Baggage left at carriers' offices.*) Common carriers, who carry passengers and their baggage as well as merchandise, are answerable under their common law liability for the baggage of passengers left at their offices in charge of their agents, with the intention of proceeding with the same in the next train of cars, steamboats, or other conveyances departing from the place where the baggage is deposited. *Camden and Amboy Rail Road Co. v. Belknap*, 21 Wendell, 354.

**BANK BILL.** If a creditor actually receives bank bills of his debtor, though he protests that he will not receive them unless the difference between their value and that of specie shall be allowed to him, and the debtor refuses to make, or to promise to make, such allowance, the creditor cannot maintain an action to recover the amount of such difference. *Phillips, Judge, v. Blake*, 1 Metcalf, 156.

**BILLS OF EXCHANGE AND PROMISSORY NOTES.** (*Notice by mail.*) Notice of protest sent by mail directed to the town where the party resides is sufficient, although there be several post offices in the same town, unless it appear that the holder knew that it should be directed in a different manner; or now by statute, unless the party when affixing his signature to a bill or note specifies thereon the post office to which notice must be addressed. *Downer v. Remer*, 21 Wendell, 10.

2. (*Release of first indorser.*) Where there are three consecutive indorsers to a promissory note, the release by the plaintiff of the first indorser, is a bar to an action against the second and third indorsers. *Newcomb v. Raynor*, 21 Wendell, 108.
3. (*Paying value.*) Where a bank receives and discounts negotiable paper, places the proceeds to the credit of the holder, and charges over against him and cancels other notes upon which are responsible parties, but which are over-due and lie under protest, such cancellation is equivalent to paying value at the time, and precludes all defence existing as between the original parties. *Bank of Salina v. Babcock*, 21 Wendell, 499.

4. (*Guaranty in form of.*) A guaranty of a debt in the form of an indorsement of a promissory note is obligatory upon the guarantor; and in case of non-payment by the debtor, the guarantor is liable for the whole amount of the debt, and not merely for the sum received by him, with the interest thereof. *Oakley v. Boorman*, 21 Wendell, 588.
5. (*Neglect of notary.*) An action does not lie against a notary for the omission of notice of protest to an indorser, where the holder may resort to other grounds for fixing the indorser independent of the notice, and wilfully or negligently omits to avail himself of such facts. *Franklin v. Smith*, 21 Wendell, 724.
6. (*Duty of bank receiving for collection.*) A bank receiving for collection a bill of exchange drawn here, upon a person residing in another state, is liable for any neglect of duty occurring in its collection, whether arising from the default of its officers here, its correspondents abroad, or of agents employed by such correspondents. *S. & M. Allen v. The Merchants' Bank*, 22 Wendell, 215.
7. (*Same.*) This liability may be varied, however, either by express contract or by implication arising from general usage in respect to such paper; it is competent, therefore, for the bank to show an express contract, varying the terms of its liability, or in the absence of a judicial determination upon the point, to show that by the usage and custom of the place, a bank thus receiving foreign paper is liable only for its safe transmission to some competent agent, and is not responsible for the acts or omissions of such agent, or of any subordinates employed by him. *Ib.*
8. (*Same.*) The inquiry, however, in such case, is not as to the opinion of merchants, however general, as to the law of the case, but as to the usage and practice in respect to such transactions, or the general understanding of merchants as to the nature of the contract evidenced by their acts, so as to enable the court to give the contract a correct interpretation. *Ib.*
9. (*Duty of notary.*) Where a debt was lost by the omission of a notary to give notice of the non-acceptance of a bill pre-

sented before maturity, it was held not to excuse a bank which had received the same for collection, that, by the law merchant of the place where the bill was presented, notice of non-acceptance was deemed unnecessary; but that on the contrary, as the *lex loci contractus* governed in a case like it, it was the duty of the bank to have given the necessary instructions to its correspondents. *Ib.*

10. (*Same.*) The omission to give notice of non-acceptance happening through the default of a commissioned public officer, a notary, does not vary the rights of the parties: *pro hac vice*, he acted merely as the agent of his employers, and not in his official capacity. *Ib.*
11. (*Witnessed note.*) The indorsee of a witnessed promissory note may maintain an action thereon, for his own use, in the name of the payee, against the maker, after the expiration of six years from the time when the cause of action accrued, if such action is brought with the consent of the payee, or he makes no objection thereto. *Hodges v. Holland*, 19 Pickering, 43.
12. (*Fictitious payee.*) A promissory note purporting to be payable to a real person and indorsed in a forged handwriting resembling and intended to pass for his, cannot be considered as a note payable to a fictitious payee and so negotiable without being indorsed. *Dana v. Underwood*, 19 Pickering, 99.
13. (*Acceptor for accommodation.*) The acceptor of a bill of exchange for the accommodation of the drawer, may pay it on the last day of grace before the commencement of business hours, and forthwith bring his action against the drawer to recover an indemnity. *Whitwell v. Brigham*, 19 Pickering, 117.
14. (*Same.*) A payment of a bill by such acceptor, before the last day of grace, will take effect as a payment at the commencement of that day, as against the drawer. *Ib.*
15. (*Acceptor for honor.*) The acceptor of a bill of exchange for the honor of the drawer cannot maintain an action thereon against him, without proof of its presentment to the drawee, and

non-acceptance or non-payment by him, and notice thereof to the drawer. *Baring v. Clark*, 19 Pickering, 220.

16. (*Possession of bill*.) The possession of a bill of exchange by the acceptor, after it has been in circulation, is *prima facie* evidence that it has been paid by him. *Ib*.

17. (*Waiver of notice*.) A promissory note was indorsed, first by the payee, and then, for the accommodation of the promisor, by the defendant, and over the payee's name were written the words, "waiving right to notice." The note was then discounted at a bank, at which the defendant was accustomed to do business, and the by-laws of which required the indorsers of notes discounted, to waive their right to notice, on the back of the paper. *Held*, that the waiver of notice, on the back of the note in question, was the several act of the first indorser, and that the defendant was entitled to notice. *Central Bank v. Davis*, 19 Pickering, 373.

**BOND.** A subsequent attaching creditor, on being admitted by the court of common pleas, under St. of 1823, c. 142, to defend an action brought by a prior attaching creditor, filed a bond for the payment of all such costs and damages as said court should adjudge and decree to have been occasioned by such defence to be so made. The action was afterwards brought, by appeal, into the S. J. C., where defence was made but did not prevail. Judgment was thereupon rendered against the defendant for the plaintiff's full demand and for costs, and execution was sued out thereon and returned satisfied in part only, the defendant being insolvent. No adjudication respecting costs, &c. was made by the court of common pleas. *Held*, that the plaintiff's only remedy was by suit on the bond, after an adjudication, as to costs and damages, by the court of common pleas; and that he had waived this remedy by taking his said judgment against the original defendant. *Whitwell v. Burnside*, 1 Metcalf, 39.

2. (*Computation of time*.) In computing the time within which a prisoner in execution must surrender himself to close confinement, when he gives bond, pursuant to Rev. Sts. c. 97, § 63,

with condition that "if he shall not be lawfully discharged within ninety days from the day of his commitment, he will surrender himself," &c., the day of commitment is to be excluded. And as such prisoner has the whole of the ninety days, thus computed, to obtain his discharge, the condition of his bond is saved, if he surrender himself on the ninety-first day. *Wiggin v. Peters*, 1 Metcalf, 127.

3. (*Same.*) A bond with condition that the prisoner "shall, at the expiration of ninety days from the day of his commitment, surrender, &c., unless he shall before that time have been lawfully discharged," is of the same legal effect as a bond with condition in the precise terms prescribed by the Rev. Sts. c. 97, § 63. *Ib.*

**BOUNDARIES.** (*Acts of parties.*) Where a deed, conveying land, is of doubtful construction as to the boundaries, the construction given by the parties themselves, as shown by their acts and admissions, is deemed to be the true one, unless the contrary be clearly shown. *Stone v. Clark*, 1 Metcalf, 378.

**BY-LAW.** (*Unequal and unreasonable.*) A by-law of the city of Boston, requiring that every person, who enters his particular drain into a common sewer of the city, shall be held to pay to the city such sum as is his just proportion of the expense of making such common sewer, having reference always to the last valuation of such person's estate, in the assessors' books, previous to the expenditure, is void for inequality and unreasonableness. *City of Boston v. Shaw*, 1 Metcalf, 130.

**CASE.** (*For seduction of daughter.*) An action on the case may be sustained by a father for the seduction of his daughter without proving any actual loss of service; it is enough that the daughter be a minor residing with her father, and that he has the right to claim her services. *Hewitt v. Prime*, 21 Wendell, 79.

2. (*Same.*) In such action a plaintiff may show in proof, in aggravation of damages, any circumstances the natural consequences of the principal act, although they did not transpire until after suit brought. *Ib.*



3. (*For collision.*) In an action on the case for a collision of vessels, the plaintiff is not entitled to recover, if the injury is in any degree attributable to his own want of care; and where such is the fact, and he obtains a verdict, a new trial will be granted. *Barnes v. Cole*, 21 Wendell, 188.
  4. (*Malicious prosecution.*) An action on the case for a malicious prosecution lies against a party who falsely and maliciously prosecutes another, although the court in which such prosecution was had was utterly destitute of jurisdiction in the matter; consequently it is not necessary in the action for the malicious prosecution to aver or prove that the court in which were the proceedings complained of had jurisdiction, provided that the malice and falsehood of the charge be put forward as the *gravamen*, and the arrest or other act of trespass be alleged merely as a consequence. *Morris v. Scott*, 21 Wendell, 281.
  5. (*Culpable negligence.*) Where a child of such tender age as not to possess sufficient discretion to avoid danger, is permitted by his parents to be in a public highway without any one to guard him, and is there run over by a traveller and injured, neither trespass or case lies against the traveller, if there be no pretence that the injury was voluntary or arose from culpable negligence on his part. *Hartfield v. Roper*, 21 Wendell, 615.
  6. (*Same.*) In an action for such injury, if there be negligence on the part of the plaintiff, there cannot be a recovery; and although the child, by reason of his tender age, be incapable of using that ordinary care which is required of a discreet and prudent person, the want of such care on the part of the parents or guardians of the child furnishes the same answer to an action by the child, as would its omission on the part of the plaintiff in an action by an adult. *Ib.*
  7. (*Same.*) The same rule, it seems, would apply in an action by a blind or deaf man, or a person *non compos*, who, under similar circumstances, received an injury on a public highway. *Ib.*
- CONSIDERATION. (*Covenant.*) Where lands were sold and conveyed by deed, containing a covenant for quiet enjoyment, and the purchaser executed his bond for the consideration money,

it was held, that it is no defence to an action on the bond, that the grantor was not seized in fee and had no right to convey the premises, if there be no allegation of any fraudulent representation on the part of the plaintiff in respect to the title; the above facts showing neither a failure or an original want of consideration. *Whitney v. Lewis*, 21 Wendell; 131.

2. (*Inadequacy.*) A promise or obligation cannot be defeated in whole or in part, on the ground of the inadequacy of the compensation received for the obligation incurred—the slightest consideration is sufficient to support the most onerous obligation; the meaning of the rule that you may impeach the consideration is only that you may show fraud, mistake or illegality in its concoction, or non-performance of the stipulations of the agreement on the part of the promisee. *Oakley v. Boorman*, 21 Wendell, 588.

3. (*Recoupement.*) Where an action is brought for breach of a contract, whether the same be sealed or not, and the defendant can show that the plaintiff has not performed the contract on his part, according to its terms or spirit, so as to entitle him to a cross-action, he may at his election, instead of bringing an action in his turn, *recoupe* his damages arising from the breach committed by the plaintiffs, whether they be liquidated or not. *Ives v. Van Epps*, 22 Wendell, 155.

4. (*Same.*) It seems, however, that in such case, the defendant should give notice with his plea of his intention to *insist* upon the right of *recoupement*. *Ib.*

CONTRACT. (*Consideration.*) A promise, by the holder of a joint and several note, to one of the makers who had made part payment thereof, that he would look to the other maker for payment of what remained due thereon, is without consideration, and furnishes no defence to an action against the maker, to whom such promise was made, to recover the remainder of the note. *Smith v. Bartholomew*, 1 Metcalf, 276.

2. (*Same.*) A promise to pay a demand which the promisee had voluntarily released for the purpose of rendering the promisor a competent witness in a suit against the promisee, is without

consideration, and an action thereon cannot be sustained. After such release, there is no such moral obligation to pay the demand, as will support a promise to pay. *Valentine v. Foster*, 1 Metcalf, 520.

3. (*Construction.*) It was agreed between A. and B. that if A. would, at his own expense, complete a certain machine which he had projected, and satisfy B., by trial thereof, that it would save one fourth, or more, of the expense then incurred by B. in a certain manufacturing process, B. would pay A. twelve per cent. on the actual savings made by said machine. A. built the machine in B.'s warehouse; but B. in fact paid all the expenses of building it, including the labor of A. thereon. B. used the machine, and the savings made by the use thereof more than repaid him the expense of constructing it. *Held*, that the machine was the property of B. *Boston India Rubber Co. v. Hoyt*, 1 Metcalf, 139.
4. (*Rescinding.*) Where goods are sold and delivered, and the seller afterwards agrees to receive in payment therefor the note of a third person, indorsed by the payee and another, and the buyer delivers such third person's note, on which the promised indorsements are forged, the seller cannot, upon discovering the forgery, maintain an action against the buyer, for goods sold and delivered, until he has rescinded the agreement and returned, or offered to return, the note. *Coolidge v. Brigham*, 1 Metcalf, 547.
5. (*Same.*) A contract cannot be rescinded by one of the parties for the default of the other, unless both of them can be put in the same state as before the contract. It must be rescinded *in toto*; and if the party rescinding has received property of any value, however inconsiderable, under the contract, he must restore it to the other party. *Ib.*
6. (*Accident.*) Where a person contracted to build a house on the land of another, and the house was, before its completion, destroyed by fire, without his fault, it was *held*, that he was not thereby discharged from his obligation to fulfil his contract. *Adams v. Nichols*, 19 Pickering, 275.

7. (*Same.*) If a person contract to build a house for another, and on his land, and the house, before its completion, be destroyed by fire, he is not entitled to any compensation for the labor and materials bestowed and furnished in pursuance of the contract. *Adams v. Nichols*, 19 Pickering, 279.
8. (*Terminating of.*) The plaintiff having agreed to spin at the defendants' factory at a certain rate per yard, and for a certain time, upon being furnished by them with the material, and the defendants having failed, occasionally, to supply sufficient material, it was *held*, that the plaintiff waived his right to terminate the contract on the ground of such failures, if he continued in the defendants' service for such a length of time afterwards, as would lead the jury to infer a waiver; and that if the plaintiff left the defendants' service without saying at the time, that he left on that ground, he thereby waived such right, so far as regarded deficiencies in the supply of material happening a short time before he left. *Thayer v. Wadsworth*, 19 Pickering, 349.
9. (*Time of payment.*) If a contract for service to be performed for a certain time be silent as to the time when payment is to be made therefor, the presumption that payment is to be made at the expiration of the term of service, and not in part before that time, may be rebutted by any evidence from which a jury may lawfully infer a different arrangement between the parties. *Ib.*
10. (*Leaving of service.*) If the plaintiff, having agreed to work for the defendant for a definite period, voluntarily leaves the defendant's service without any fault on the part of the defendant and without his consent, before the expiration of the term, he cannot recover, either on the express contract or on a *quantum meruit*, for the labor actually performed by him. *Olmstead v. Beale*, 19 Pickering, 528.

CONVEYANCE. (*Monuments.*) In a deed of conveyance of woodland, the boundary line was described as running, "northerly to land of M., thence southeasterly by M.'s land, thirty-eight rods and one half, to a stump and stones;" and immediately after the conveyance the parties went upon the land

and a monument was pointed out as being at the northwesterly corner, and a stump and stones as at the northeasterly corner, and the length of the line between them was exactly thirty-eight rods and a half; but a gore of land intervened between this line and the land of M. It was *held*, that the monuments were to govern, and therefore that the gore did not pass by the deed. *Frost v. Spaulding*, 19 Pickering, 445.

**CORPORATIONS.** (*Remedy against delinquent stockholders.*)

Where an incorporated company, the capital stock of which is divided into shares, are authorized by their act of incorporation to make calls upon the stockholders for the payment of the sums by them respectively subscribed, in such proportions and at such times as the directors see fit, under penalty of forfeiture of the shares subscribed and of the previous payments made thereon, the company may, in case of non-payment, proceed by suit to recover the amount of the calls, or may declare a forfeiture of the stock. *Herkimer Manuf. and Hydraulic Co. v. Small*, 21 Wendell, 273.

2. (*Same.*) So even after suit brought, they may declare a forfeiture of the stock, and such latter proceeding cannot be pleaded in bar of the further maintenance of the suit, where the value of the stock forfeited is not equal to the money due to the company. The stockholder, however, is entitled in such case, on the assessment of the damages, to insist that the value of the stock forfeited shall be allowed in mitigation or diminution of the sum which the plaintiffs would otherwise be entitled to recover. *Ib.*
3. (*Same.*) Where the stock forfeited is equal in value to the money which may be demanded by the company, the forfeiture may be pleaded in bar; but a plea of forfeiture without such averment of value is bad. *Ib.*
4. (*Same.*) The clause in an act of incorporation of a turnpike or railroad company authorizing a forfeiture of stock and previous payments in cases of non-payment of calls, confers a cumulative remedy; and does not deprive the company of the right to proceed by action for the recovery of subscrip-

tions. *Troy Turnpike and R. R. Co. v. M<sup>c</sup>Chesney*, 21 Wendell, 296.

5. (*Same.*) Nor is the company limited to the remedy by forfeiture, although the promise be expressed in the subscription to be upon pain of forfeiting, &c., and consequently the plaintiffs may declare upon such contract as upon an absolute promise. *Ib.*
6. (*Transfer of stock.*) An action of *assumpsit* lies against a corporation for refusing to permit a transfer of stock upon its books; and the measure of damages is the full value of the stock at its highest price at any time between the refusal and the commencement of the suit. *Quere.* Might not the time have been extended to the day of trial? *The Commercial Bank of Buffalo v. Kortright*, 22 Wendell, 348.
7. (*Same.*) A blank transfer of a certificate of stock, where the holder has affixed his name and seal upon the back of the certificate is valid; and the transferee is authorized to fill it up by writing a transfer and a power of attorney over the signature. *Ib.*
8. (*Same.*) Proof of custom as to the mode of transferring stock is admissible. *Ib.*
9. (*Agents of.*) A corporation is bound by the acts of its acknowledged agents in the common transactions of the corporation, although the appointment of the agents be not evidenced by the records of the corporation. *Ib.*
10. (*Election of directors.*) Where, by the act incorporating an insurance company, the management of the stock and affairs of the corporation is given to a board of twenty-three directors to be annually elected, a major part of whom by the act are competent to the transaction of all the business of the corporation, and an election of directors takes place, at which only twenty-two persons receive a plurality of votes, such twenty-two persons are duly elected, and take the place of their predecessors, notwithstanding that it chanced that the full number of twenty-three directors was not filled up. *In the matter of the Union Insurance Co.*, 22 Wendell, 591.
11. (*Same.*) Where, under such circumstances, the old board

conceived that the election had wholly failed, and a second election was held by their order, at which twenty-three directors were chosen, this court, upon the summary application authorized by statute, set aside the second election, declared the twenty-two directors first chosen duly elected, and ordered a new election to supply the vacancy of the one director who was not chosen at the first election. *Ib.*

12. (*Same.*) Application was made to the court previous to the second election to declare the twenty-two persons chosen, directors of the company, and to direct the election of one additional director; but the court refused to act upon it, considering the proceeding premature. *Ib.*

13. (*Same.*) It seems, that the stockholders, without any order of the court, have the power to fill up a vacancy happening under the above circumstances; and further, that on the neglect of the board to make order for an election to supply such vacancy, a *mandamus* would lie. *Ib.*

14. (*Execution of powers by.*) Where an aggregate body is empowered to grant an authority or privilege, as, for instance, a collegiate degree, and the mode of making such grant or proving the same, is not specially pointed out, a vote by such body that the authority or privilege be granted, is an execution of the power; and a duly authenticated copy of the vote sufficient proof of it. *Wright v. Lanckton*, 19 Pickering, 288.

**COVENANT.** (*Running with land.*) If a grantor of land is not seized thereof when he makes his deed of conveyance, his covenant of warranty does not attach to the land and run with it; and he, therefore, is not liable to an action, by the assignee of his grantee, for breach of such covenant. *Slater v. Rawson*, 1 Metcalf, 450.

2. (*Estoppel.*) Where an assignee of a grantee, in an action of covenant against the grantor, avers and proves that the grantor had neither seizin nor title, at the time of his grant, the grantor is not estopped to rely on his want of seizin as a defence to the action on the covenant of warranty. *Ib.*

3. (*Against incumbrances.*) In a deed conveying real estate, the

grantor, after a description thereof, added that it was sold subject to the right of the widow and daughter of B. in the same — the daughter's "right to exist no longer than the widow occupies the premises to which she is entitled under said B.'s will" — and covenanted that the premises were free from all incumbrances except the above mentioned. By the will of B., the daughter had a right after the widow's death, in the estate conveyed. *Held*, that the grantor was liable to the grantee, in an action on the covenant against incumbrances. *Jarvis v. Buttrick*, 1 Metcalf, 480.

**DAMAGES.** (*In replevin.*) In replevin, where the defendant has obtained judgment *de retorno*, and sued out a writ of inquiry to have his damages assessed for detention, the measure of damage ordinarily is the interest upon the value of the goods when taken, from the time of the taking until the *quarto die post* succeeding the execution of the writ of inquiry. *Brizsee v. Maybee*, 21 Wendell, 144.

2. (*Same.*) It seems, however, that where a writ of replevin is sued out fraudulently, or without color of right, that a jury would be warranted in giving exemplary damages, as in a case for a wilful and malicious trespass. *Ib.*

3. (*Breach of contract.*) In an action for the recovery of the price stipulated for the building of a steamboat, the plaintiff is entitled to recover the full amount, without any deduction by way of *recoupment* of damages to the defendant in consequence of damage sustained by him for the loss of trips and the profits resulting therefrom occasioned by defects in the boat or its machinery. *Blanchard v. Ely*, 21 Wendell, 342.

4. (*Same.*) The defendant in such case is, however, entitled to an allowance for moneys necessarily expended by him in supplying defects in the vessel or its machinery, so as to make it conform to the plan specified in the contract; and where it is manifest that an allowance on that account ought to have been made, and was not made by the jury, a new trial will be granted. *Ib.*

5. (*Liquidated or not.*) Whether a sum agreed upon by the par-



ties to a contract as the measure of damages, shall be considered as liquidated damages, or only as a penalty, depends upon the intent of the parties and the peculiar circumstances of the subject matter of the contract; if the damages must necessarily be wholly uncertain and incapable of estimation, the party failing to perform will be held to pay the stipulated sum as liquidated damages, and it was accordingly held, where the plaintiffs gave \$3000 for the patronage and good will of a newspaper establishment, and \$500 for the type and printing apparatus, and the defendants (the vendors) covenanted that they would not publish or aid or assist in publishing a rival paper, and fixed the measure of damages for a violation of their covenant at \$3000, and did subsequently aid and assist in the publication of such paper; that the plaintiffs were entitled to recover the whole sum of \$3000, as liquidated damages. *Williams v. Dakin*, 22 Wendell, 201.

**DEED.** (*Imbecility of grantor.*) Imbecility of mind, not amounting to lunacy or idiocy in the grantor of land, is not sufficient to avoid his deed, where, in the obtaining it, there is no fraud. *Odell v. Buck*, 21 Wendell, 142.

2. (*Reservation.*) Where the owner of land conveys away a portion of his premises, a part of which at the time of the conveyance are flowed by a mill dam belonging to him, and makes no reservation of the right to continue to flow the land, he loses the right, and cannot set up an implied reservation. *Burr v. Mill*, 21 Wendell, 290.

3. (*Incident.*) If the owner had sold and conveyed the mill to a third person, it would have been otherwise; then the right to flow the land would have passed as an incident to the purchaser of the mill, and could not have been cut off by the grantor. *Ib.*

4. (*Alteration.*) An alteration in a deed though made subsequent to its execution by the grantee himself does not avoid it, if under the deed a legal title became vested in the grantee by transmutation of possession, either by livery of seizin or by the operation of the statute of uses. *Herrick v. Malin*, 22 Wendell, 388.

5. (*Same.*) It is otherwise, however, when an action is brought upon the deed for a breach of the covenants therein, or upon a bond or other sealed instrument; then upon the plea of *non est factum*, the plaintiff is bound to show it to be the deed of the party prosecuted, and if there has been an alteration of the instrument, it must be satisfactorily explained. *Ib.*

6. (*Same.*) Where the alteration in a deed is material, the party seeking to enforce it, is bound to give some explanation as to the apparent alteration, even if the deed be of more than thirty years standing, and is offered in evidence without proof, as an ancient deed. So it seems, explanation may be required where the deed is proved without producing and examining the subscribing witnesses; and if it be not given, a jury will be warranted in finding in opposition to that part of the deed appearing to be altered, if the apparent alteration be of such a character as to create a strong suspicion that it had been fraudulently made. *Ib.*

7. (*Same.*) It seems, however, that where there is a mere interlineation in a deed, without any thing to excite suspicion that it was made at the time that the deed was drawn and executed, the reasonable presumption is, that it was made before the deed was executed. *Ib.*

DEVISE. (*Limitation over after an absolute right.*) Where a testator devises all his real and personal estate, giving the devisee power of unqualified disposition of the property devised, the devisee takes a fee simple absolute in the real estate, although there be no words of limitation applicable to such devise, and notwithstanding that by a subsequent clause in the will a limitation over is created in favor of another person, as to so much of the property given to the first devisee as may remain at the decease of the first taker. *Helmer v. Shoemaker*, 22 Wend. 187.

2. (*Parol evidence, to explain.*) Where a testator gives all his back lands to certain devisees, parol evidence is admissible to designate the premises, as by showing that certain lands owned by him, were called and known by that designation by him, his family and neighbors. *Ryers v. Wheeler*, 22 Wend. 148.

3. (*Declarations of testator.*) Declarations of the testator at the

\*time of the making of the will, explaining the meaning of the terms, or defining the property intended to be devised, cannot be received in evidence; but if made before or after the execution of the will, proof of such declarations is admissible. *Ib.*

**DISSEIZIN.** (*By levy of execution.*) The levy of an execution on land which is not the judgment debtor's does not work such a disseizin of the true owner, as will prevent his maintaining an action of trespass, without reëntry, against the judgment creditor or those acting under him. *Blood v. Wood*, 1 Metcalf, 528.

2. (*Samg.*) An execution was levied on land not the judgment debtor's, being part of a large unenclosed meadow, and the judgment creditor entered thereon two or three times for the purpose of showing the grass for sale, but took no actual possession: He afterwards advertised a sale of the grass, in a public newspaper, as grass growing on his land, and caused the same to be sold at auction, at a distance from the land, and the purchaser thereof cut and carried it away—the true owner of the land having no actual notice of the proceedings. *Held*, that these acts did not constitute such a disseizin or ouster of the true owner, as to prevent his maintaining an action of trespass against the purchaser of the grass. *Ib.*

**DRUNKARDS.** (*Validity of the acts of.*) Long continued inebriety, although resulting in occasional insanity, does not require proof of a lucid interval to give validity to the acts of the drunkard, as is required where general insanity is proved on a question of *devisavit vel non*. Where the indulgence has produced permanent derangement of mind, it would be otherwise, it seems. *Gardner v. Gardner*, 22 Wend. 526.

2. (*Same.*) The act of a party addicted to intemperance, in disposing of his property, will not be invalidated on the ground of undue influence exercised over him by the inmates of his family, where the influence arises from kind offices springing from attachment or affection; to vitiate the act, the influence must be shown to have arisen from threats, force or coercion, destroying free agency, and the boon to have been obtained by such coer-

cion, or by importunity that could not be resisted — producing compliance for the sake of peace. *Ib.*

**EQUITY.** (*Party to bill.*) A member of a corporation, though not an officer or agent thereof, may rightly be made a party to a bill in equity against the corporation and individuals, for discovery and relief, and is bound to answer, on oath, so much of the bill as seeks for a discovery of matters affecting the corporation. *Wright v. Dame*, 1 Metcalf, 237.

2. (*Same.*) It is not necessary that such bill should aver that the member of the corporation, who is thus made defendant, has any information which is not possessed by other members thereof; nor need the bill assign any special reason for requiring such defendant to make the discovery prayed for. *Ib.*

**ESTOPPEL.** (*Conveyance.*) Where, at the first trial of a cause, a party sets up a conveyance as a mortgage, and it is decided that such conveyance is absolute, he is not estopped to rely on it as absolute, at a second trial. *Miller v. Baker*, 1 Metcalf, 27.

2. (*Admission of debtor.*) Where a debtor admits to a third person an existing balance due from him on a bond or other chose in action, and upon the strength of such admission such person takes an assignment of the bond or other chose in action, the debtor in a suit subsequently brought for the recovery of such balance is estopped from showing a claim against the original creditor, for the purpose of reducing the amount of the recovery, although the assignment was taken for a precedent debt. *Foster v. Newland*, 21 Wendell, 94.

2. (*Admission of a promissor.*) Where the maker of a note on its being presented to him by a person about to take a transfer of it, acknowledges himself to be holden for its payment, and the note is purchased for value, and the maker subsequently makes a payment upon it, he cannot afterwards sue to recover back the money thus paid, although he shows that he signed the note merely as surety, that it was paid by the principal, that it was over-due at the time of the transfer, and that he made the

acknowledgment of his liability in ignorance of the payment by the principal. *Petrie v. Feeter*, 21 Wendell, 172.

**EVIDENCE.** (*Presumption of death.*) When a person leaves his usual home and place of residence, for temporary purposes, and is not heard of, or known to be living, for the term of seven years, the legal presumption is that he is dead. *Loring v. Steineman*, 1 Metcalf, 204.

2. (*Boundaries.*) When the proprietors of adjoining lots of land agree upon a dividing line between them, the presumption is that it is the true line according to the original location of the lots. *Sparhawk v. Bullard*, 1 Metcalf, 95.

3. (*Dishonor of note.*) In an action by the indorsees against the maker of a negotiable note, the burden is on the defendant to prove that the note was negotiated after it was due and dishonored; and that burden is not removed by proof that the note was transferred and delivered to the plaintiff before it was dishonored, but was not indorsed until afterwards. *Ranger v. Cary*, 1 Metcalf, 369.

4. (*Domicil.*) In an action to try the question whether the plaintiff, who had left the country with his family, was liable afterwards to be taxed as an inhabitant of the place of his former residence, a letter from him to his agent in that place, expressing his intention to reside abroad permanently, is admissible in evidence, if written before he knew that a tax had been assessed upon him, though written after the assessment. Otherwise, it seems, of such letters written after he knew that he was taxed. *Tharndike v. City of Boston*, 1 Metcalf, 242.

5. (*Privileged communication.*) A physician consulted by the defendant in an action on the case for seduction as to the means of producing an abortion, is not privileged from testifying, by the statute forbidding a disclosure of information received by a physician to enable him to prescribe for a patient. *Hewitt v. Prime*, 21 Wendell, 79.

6. (*Competency.*) In an action by a bank against the indorsers of a promissory note, the certificate of the notary of the bank, if he be a stockholder, is not admissible in evidence to prove pre-

sentment, protest and notice. *Herkimer Co. Bank v. Cox*, 21 Wendell, 119.

7. (*Same.*) One of several partners is a competent witness for his copartners in an action against them in which he is not made a defendant for a debt claimed to be due by the firm, if he be released by his copartners from all liability for contribution. *Lefferts v. De Mott*, 21 Wendell, 136.

8. (*Same.*) The king's bench of England holds that to render such a party competent, it is necessary, in addition to the release of his copartners, that he release to them his interest in the surplus of the assets of the firm as far forth as the same may be affected by the demand in controversy: such release for that purpose is here held unnecessary. *Ib.*

9. (*Same.*) In an action on the case against the owners of a steamboat, for negligence in the navigating of the vessel, whereby the plaintiff was injured, the steersman of the boat is a competent witness for the defendant, if it appear that he acted under the immediate direction of the master of the boat. *Barnes v. Cole*, 21 Wendell, 188.

10. (*Mistake in deposition.*) Where, in the testimony of a witness taken under a commission, a mistake occurs in reference to the time of the transaction testified to, evidence is admissible to show the mistake and fix the true time. *McArthur v. Hurlbert*, 21 Wendell, 190.

11. (*Oath.*) Where a witness called to testify is of tender years, the party against whom he is called, may require that he shall be examined as to his understanding of the nature and obligations of an oath. *The People v. McNair*, 21 Wendell, 608.

#### EXECUTOR AND ADMINISTRATOR. (*Judgment against.*)

If an administrator suffers judgment to be recovered against him before he represents the deceased's estate insolvent, he must pay the full amount of such judgment, without regard to the assets of the deceased. And if, on demand made upon him to pay such judgment, or to show sufficient property of the deceased to be taken in execution to satisfy the same, he neglects or refuses so to do, he and his sureties are liable, on his admin-

istration bond, to a suit by the judgment creditor, in the name of the judge of probate, although the deceased's estate is in fact insolvent. *Newcomb, Judge, v. Goss*, 1 Metcalf, 333.

**FALSE PRETENCES.** The defendant having from time to time deposited money in and drawn checks upon a bank, under a fictitious name, at length, for the purpose of defrauding the bank, drew such a check when he had no money deposited, and presented it himself, and the bank paid him the amount of it; whereupon he was indicted under St. 1815, c. 136, against obtaining ~~money~~ by false pretences with intent to defraud. *Held*, that the assumption of a fictitious name was a false pretence, within the meaning of the statute, but that as it appeared that it had no influence in inducing the bank to pay the money, proof of it would not support the indictment. *Commonwealth v. Drew*, 19 Pickering, 179.

2. *Held* also, that merely opening and keeping an account in the bank, though as part of a stratagem by which the defendant intended to practise the fraud, was not a false pretence, within the statute. *Ib.*
3. *Held* also, that the mere drawing and presenting the check and receiving the money upon it from the bank, were not a false pretence, within the statute. Otherwise, it seems, if the drawer of a check on a bank passes it to a third person, when he has no funds nor credit in the bank, and knows that the check will not be paid. *Ib.*

**FIXTURE.** (*What.*) Where the owner of land erects upon it a dye-house and sets up dye-kettles therein firmly secured in brick work, they become part of the realty and pass by a deed of the land, without express words. *Noble v. Bosworth*, 19 Pickering, 314.

2. (*Parol reservation.*) A parol reservation of a fixture, before or at the time of the delivery of a deed of the land, is inadmissible in evidence to control the ordinary effect and operation of the deed. *Ib.*

**FRAUD.** (*In procuring an indorsement.*) The holder of a note, who fraudulently procures it to be indorsed by a minor, and

afterwards sells it to a person who relies on the validity of such indorsement, is liable to an action by such person, though, at the time of sale, he had no fraudulent intent. Selling the note without erasing such indorsement, or disclosing the minority of the indorser, is tantamount to a direct affirmation by the seller, that the indorsement constitutes a valid contract. *Lobdell v. Baker*, 1 Metcalf, 193.

**FRAUDS, STATUTE OF.** (*Sale of goods, &c.*) An agreement to make machines for a specified price, and to find the material therefor, is not within the statute of ~~frauds~~—Rev. Sts. c. 74, § 4. *Spencer v. Cone*, 1 Metcalf, 283.

2. (*Lands.*) An oral agreement for the sale of mulberry trees growing in a nursery and raised to be sold and transplanted, to be delivered on the ground where they ~~are~~ growing, upon payment therefor being made, is not a contract for the sale of an interest in or concerning lands, &c., within the statute of frauds—Rev. Sts. c. 74, § 1. *Whitmarsh v. Walker*, 1 Metcalf, 313.

3. (*Same.*) A license to enter upon land, and remove trees therefrom, passes no interest in the land, and, though not in writing, is valid, notwithstanding said statute. *Ib.*

4. (*Same.*) Part performance of an oral contract for the sale of lands, &c., does not take such contract out of the operation of said statute. *Adams v. Townsend*, 1 Metcalf, 483.

5. (*Contract to be performed within a year.*) A parol contract is not void by the statute of frauds, as an agreement not to be performed within a year from the making thereof, if the performance of it depends upon a contingency which may happen within the year, although in fact it do not happen until after the expiration of the year. *Peters v. Westborough*, 19 Pickering, 364.

6. (*Same.*) Thus, a parol contract to support a person for a certain number of years, is not within the statute; for if he die within one year, having been supported under the contract until his death, the contract will have been fully performed. *Ib.*

**GUARANTY.** (*Continuing.*) A writing in these words, "I



agree to be responsible for the price of goods purchased of you, either by note or account, by H. H. at any time hereafter, to the amount of \$1000," is a continuing guaranty, to that extent, for goods to be at any time sold to H. H. before the credit is recalled. *Bent v. Hartshorn*, 1 Metcalf, 24.

**HUSBAND AND WIFE.** (*Conveyance by wife.*) Where a husband, by deed, in his own name only, conveys his wife's land in fee, and she merely affixes her signature and seal to the deed, "in token of her relinquishment of all her right in the bargained premises," her right in fee is not thereby conveyed, and she, after the decease of her husband, may maintain a writ of entry, on her own seizin, to recover the land. *Bruce v. Wood*, 1 Metcalf, 542.

2. (*Contracts between.*) A *feme covert* may contract a debt in regard to her separate estate, and may even become the debtor of her husband, for money borrowed of him to improve such estate; and payment of the debt thus contracted will be enforced in equity as a lien upon the estate, unless by the terms of the donation the *feme* be prohibited from charging the estate. *Gardner v. Gardner*, 22 Wend. 526.

3. (*Same.*) A debt thus contracted by the wife, may be discharged by a *donatio causa mortis*, as by the declaration of the husband that the money was her's, and by destroying the bond, the evidence of the debt. *Id.*

**INFANT.** (*Authorized to receive his earnings.*) A minor authorized by his father to go out to service and receive his earnings to his own use, may maintain an action for his wages against his employer, although such authority was not made known to the employer at the time when the minor entered into his service. *Corey v. Corey*, 19 Pickering, 29.

2. (*Same.*) If, in such case, no express contract be made with the employer, the law will imply a promise by him to the minor, and not to the father. *Id.*

3. (*Avoidance of contract by.*) If a minor, after the death of his father, ship himself in a whale ship, as a mariner, the contract, being voidable by him, is legally avoided by his desertion of

the ship before the completion of the voyage, and he may, thereupon, recover a *quantum meruit* for his services. *Vent v. Osgood*, 19 Pickering, 572.

**INSURANCE.** (*By part owner.*) A part owner of a vessel may insure his actual interest therein, though he do not state to the underwriter the nature or extent of such interest. If he own part of a vessel, as administrator, he may insure it without stating the capacity in which he owns. But a part owner, insuring in his own name only, and not mentioning any other owner or person interested, can recover only the amount of his own interest. *Finney v. Warren Ins. Co.* 1 Metcalf, 16.

2. (*Same.*) One who owns part of a vessel has no insurable interest in the other part thereof, merely by reason of his keeping the accounts, receiving the avails, making the disbursements, and directing the voyages of such vessel. *Ib.*

3. (*By agent in his own name.*) One who procures insurance to be made, in his own name, for another person, or for whomsoever it may concern, cannot maintain an action on the policy, in his own name, if his authority is disavowed or revoked, before action brought, unless there is some express provision, in the policy, authorizing him to sue, or he has a lien or other interest, which the party whose property is insured cannot defeat. *Reed v. Pacific Ins. Co.*, 1 Metcalf, 166.

4. (*Same.*) One who thus procures insurance on a vessel, not as a broker or general agent, but in pursuance of a specific order, and under directions to forward the policy to the party who gives the order, has no lien on the policy, nor interest in it. And though he be ship's husband for the general management of the vessel insured, yet he has no lien on the policy for the balance of his account. *Ib.*

5. (*Acceptance of abandonment.*) When an underwriter, who has refused to accept an abandonment of a stranded vessel, takes possession of the vessel for the purpose of removing, repairing, and restoring her to the owner, he is bound to use due diligence and despatch, as well in removing as in repairing her; and want of such diligence and despatch in removing her operates

as a constructive acceptance of the abandonment, although the repairs are afterwards made with reasonable despatch. *Reynolds v. Ocean Ins. Co.*, 1 Metcalf, 160.

6. (*Same.*) The underwriter's duty and liability, in such case, are not varied by a clause in the policy of insurance, that "the acts of the assurer, in recovering, saving, and preserving the property insured, in case of disaster, shall not be considered an acceptance of an abandonment;" such clause being inserted *diverso intuitu*. *Ib.*

7. (*Of freight.*) An insurance of "freight on board" a vessel means the same as "freight of the vessel." *Robinson v. Manufacturers' Ins. Co.*, 1 Metcalf, 143.

8. (*Same.*) Insurance was effected on freight of a vessel at and from Cadiz to a port in Sicily, and at and from thence to her port of destination in the United States. The vessel was lost in the Bay of Cadiz, after being ready to sail for Palermo in Sicily, having on board a very small quantity of goods on freight, and those shipped for her port of destination in the United States. The assured had chartered the vessel, except the cabin, deck, and necessary room for the accommodation of the crew, (reserving to the master the privilege of freight in the cabin,) from Palermo to New York, for \$2500, and \$35 *per diem* demurrage. *Held*, that the whole freight from Cadiz to Palermo, and from Palermo to the United States, was one entire subject of insurance; that the valuation was not so great as to raise a suspicion of fraud; and therefore that the underwriters were not entitled to have the policy opened, but were liable to a total loss. *Ib.*

9. (*Return.*) Where the assured pays for insurance in his own name on the whole vessel, when he owns but part, he is entitled, on a count for money had and received, to a return of premium for the short interest. *Finney v. Warren Ins. Co.* 1 Metcalf, 19.

10. (*Loss by fire.*) A destruction of merchandise insured, by the blowing up with powder of a building in which it was stored, under the direction of a chief magistrate of a city to prevent

the spreading of a conflagration, was held to be a peril insured against in a policy against fire, and the insurers adjudged liable for the loss, where it appeared that the fire would have destroyed the building had it not been blown up. *City Fire Ins. Co. of N. Y. v. Corlies*, 21 Wendell, 367.

11. (*Usurped power.*) The power thus exercised, though it should be admitted to have been illegally exercised, does not bring the case within the exception exempting the assurers from liability in case of loss arising from usurped power. The usurped power provided for in a policy means a usurpation of the power of government, and not a mere excess of jurisdiction by a lawful magistrate. *Ib.*

12. (*Misdescription.*) Where an insurance was effected at New York on goods laden or to be laden on board the brig Abeona, from one port to another, and the goods were shipped in a vessel called the Abeona, which subsequently was lost, and it appearing that there were two vessels frequenting the port of New York called Abeona, one a brig, and the other a schooner, half brig, brigantine, or hermaphrodite brig, and that the goods were embarked in the latter vessel, it was held, that without proof that the vessel in which the goods were laden was in the contemplation of the parties at the time of the contract, there was no room for the presumption that the parties meant a different vessel from that described in the policy. *Sea Ins. Co. v. Fowler*, 21 Wendell, 600.

13. (*Representation.*) Where, in an action on a policy of insurance for the loss of a ship, it appeared that at the time of the application for the insurance, a representation was made that no spirits would be allowed on board, and it turned out in proof that the master of the vessel had in the cabin two kegs of spirits, containing four or five gallons each, which would have belonged to him as a perquisite on his arrival at the port of destination, but which were not broached or any of the contents used on board of the vessel, it was held, that the spirits not being on board for use, and not being in fact used, the policy was not invalidated. *Irvin v. The Sea Insurance Co.* 22 Wendell, 380.

14. (*Same.*) It was further held, that the representation would not prevent the taking on board a whole cargo of spirits, if taken for transportation in the regular course of business. *Ib.*
  15. (*Barratry.*) The stealing of cargo by the mariners (other than petty thefts) is barratry. *Stone v. National Insurance Co.* 19 Pickering, 34.
  16. (*Same.*) A policy of insurance upon the mate's adventure against barratry of the mariners, covers a loss by the theft of the mariners. *Ib.*
  17. (*Same.*) Where the mate took a bill of lading of his outward adventure and received the proceeds in dollars, which he put into his trunk, and usually kept his trunk in the cabin, but while the cabin was painting in a foreign port, the officers were obliged to sleep and keep their trunks and baggage in the steerage, and the mate's trunk, being placed under the steerage steps, was opened and the dollars stolen by the cook and steward, it was held, that no negligence was proved which would discharge the underwriters on the mate's adventure, against barratry of the mariners. *Ib.*
  18. (*Repairs.*) If a vessel, in the course of her voyage, put into a port where repairs can be made, and afterwards sail therefrom with a defect in her bottom, produced during the voyage by the perils of the seas, and which causes her to founder, the insurers are liable for the loss, unless the captain had reasonable cause to suspect the existence of the defect when the vessel was in such port, or had reasonable cause to believe that she could not proceed safely home without having the same repaired. *Starbuck v. New England Marine Insurance Co.*, 19 Pickering, 198.
- JURISDICTION. (*Lands ceded to United States.*) Persons who reside on lands purchased or ceded to the United States for navy yards, forts and arsenals, and where there is no other reservation of jurisdiction to the state than that of a right to serve civil and criminal process on such lands, are not entitled to the benefits of the common schools for their children in the towns in which the lands are situated — nor are they liable to be assessed for their polls and estates to state, county and town

taxes, in such towns — nor do they gain a settlement in such towns, for themselves or their children, by residence for any length of time on such lands — nor do they acquire, by residing on such lands, any elective franchise as inhabitants of such towns. 1 Metcalf, 580.

**LANDLORD AND TENANT.** (*Payment in advance.*) A lessee who has paid rent in advance, is not liable for the same rent to a grantee of the land, subject to the lease, taking without notice of such payment. *Stone v. Patterson*, 19 Pickering, 476.

**LEX DOMICILII.** It seems, that where a plaintiff brings an action in respect to personal property in the place where he is domiciled, that the law of that place, and not the *lex rei sitæ* governs. *Hoffman v. Carow*, 22 Wendell, 285.

**LIEN.** (*Of mechanic.*) Where one who had contracted to finish a machine, employed a mechanic, without the knowledge of the owner, to perform the work, disclosing to him the contract with the owner, it was held, that such mechanic did not acquire a lien in his own right, for his labor upon the machine, as against the owner, although the owner knew that he was performing the work, while it was in progress. *Hollingsworth v. Dow*, 19 Pickering, 228.

**LIMITATIONS, STATUTE OF.** (*New promise.*) A memorandum written on a note, by the maker, in these words, "for value received, I hereby acknowledge this note to be due, and promise to pay the same on demand," and signed in the presence of an attesting witness, is itself a "promissory note," within the fourth section of Rev. Sts. c. 120, and an action thereon is not barred by the statute of limitations. But if the original note was without consideration, or the consideration thereof had failed, and there was no new consideration for such memorandum, (or new note,) the payee cannot recover thereon. *Commonwealth Ins. Co. v. Whitney*, 1 Metcalf, 21.

**MISTAKE.** (*In stating an account.*) It is a general rule that a mistake in the stating of an account, may be corrected; but to this rule there are many exceptions. In this case, it was held, that a balance struck by parties in respect to certain matters

after a hearing before referees had commenced, and which was reported to the referees and entered by them on their minutes, was conclusive as an admission in the cause, and could not be opened. *Clark v. Fairchild*, 22 Wendell, 576.

**MORTGAGE.** (*Of real estate by indenture.*) A lease for years by indenture, in which the lessor acknowledges the receipt, in advance, of a gross sum, in full for rent of the demised premises during the term, and in which the lessee covenants to reconvey the premises on payment of said sum and interest thereon, is a mortgage; and the rights and duties of the parties are like those of mortgagors and mortgagees of estates of freehold. *Nugent v. Riley*, 1 Metcalf, 117.

2. (*Same.*) So of a lease prepared in such form, but executed by the lessor only; provided the lessee accepts it and takes possession under it. *Ib.*
3. (*Same.*) In the latter case, there is no covenant, technically, on the part of the lessee, upon which an action can be maintained. But if he underlets the demised premises, and receives rent, before the term expires, to the amount of the gross sum advanced, by him, and interest thereon, his estate for years is thereupon defeated, and the lessor is immediately in of his old estate. All that the lessee receives above that amount, is received, not as mortgagee, but for the lessor, who may recover it of him in an action for money had and received. *Ib.*
4. (*Abatement of sum due.*) If a mortgage be made of two parcels of land as security for the payment of a sum of money, and the right in equity to redeem one parcel be transferred to A. and the right to redeem the other to B., and the mortgagee afterwards release A.'s parcel from the mortgage, B., on redeeming, cannot compel A. to contribute, but he is entitled to have an abatement of such a proportion of the sum due on the mortgage as the value of A.'s parcel bore, at the time of the execution of the mortgage, to the value of both parcels. *Parkman v. Welch*, 19 Pickering, 231.
5. (*Foreclosure.*) If a mortgagee enters for condition broken, and is subsequently put under guardianship as a spendthrift, his

guardian is authorized to restore the possession of the land to the mortgagor, and thereby to prevent a foreclosure. *Botham v. McIntier*, 19 Pickering, 346.

6. (*Effect of Entry.*) A mortgagee who enters for condition broken and orders the tenant in possession to pay him the rent, is entitled thereto as against the mortgagor, whether the entry be or be not valid for the purpose of foreclosure. *Stone v. Patterson*, 19 Pickering, 476.

7. (*Note outlawed.*) In the case of a mortgage of real estate to secure the payment of a promissory note, although the note be barred by the statute of limitations, yet if it has not been paid, the mortgagee has his remedy on the mortgage. *Thayer v. Mann*, 19 Pickering, 536.

**PARTNER.** (*Release.*) A bond given by one of several partners, to a debtor of the firm, to pay the debt and save the debtor harmless from the same, cannot be pleaded or given in evidence as a release, in an action by the firm against the debtor. *Emerson v. Baylies*, 19 Pickering, 55.

**PARTNERSHIP.** (*Liability of dormant partner.*) A dormant partner is not liable for debts of the firm contracted after a dissolution of the partnership, although he does not give notice of such dissolution. *Grosvenor v. Lloyd*, 1 Metcalf, 19.

2. (*Authority of partner.*) Under an authority, though by parol only, given to one partner by the others, after a dissolution of the partnership, to sell a negotiable note made to the firm before dissolution, he may indorse such note, "without recourse," in the name of the firm. *Yale v. Eames*, 1 Metcalf, 486.

3. (*Fraud by.*) All the members of a firm are answerable for a fraud committed by one of them—or by their agent acting within the scope of his authority—in the sale of partnership property. *Locke v. Stearns*, 1 Metcalf, 560.

4. (*Dealings with.*) Where a note was made by a firm in the copartnership name, which was discounted by a bank for the accommodation of the payee, and was repeatedly renewed, it was held, that the firm must be considered as having had dealings with the bank within the meaning of the rule requiring



actual notice of the dissolution. *Vernon v. The Manhattan Company*, 22 Wendell, 183.

5. (*Same.*) It seems, however, that the rule of actual notice would not be applied to every person, through whose hands, in the ordinary course of business, the paper of the firm had passed, but would be limited to those who were in the habit of taking the paper under circumstances where the knowledge of the fact on the part of the firm might be legally presumed. *Ib.*

**PATENT.** (*Specification.*) A description of an improvement of a machine already in use, in a conveyance by a patentee to a purchaser of the right to vend the same within prescribed limits, is sufficient, if it set forth the nature of the invention and the manner in which it may be made available, with so much particularity as to enable persons of competent skill to construct and apply the improvement; it is not necessary to describe the original machine. *Harmon v. Bird*, 22 Wendell, 113.

**PAYMENT.** (*By void conveyance.*) Where, under an agreement between a debtor and his creditor, the debtor procured a conveyance to the creditor from a third person of all his title to land specified in the deed, and the creditor accepted the same as a payment in full, but it subsequently appeared, that the grantor had no title to any such land, it was held, that, in the absence of fraud on the part of the debtor, the claim of the creditor upon him was discharged. *Reed v. Bartlett*, 19 Pickering, 273.

**POWERS.** (*Of public officers and commissioners.*) In the exercise of a public as well as private authority, whether it be ministerial or judicial, all the persons to whom it is committed must confer and act together, unless there be a provision that a less number may proceed. Where the authority is public, and the number be such as to admit of a majority, such majority will bind the minority after all have duly met and conferred. *Downing v. Rugar*, 21 Wendell, 178.

2. (*Same.*) Where an act of incorporation of a railroad company, appoints a certain number of commissioners to open books to receive subscriptions to the capital stock of the corporation,

and to distribute the stock among the several subscribers in such manner as they shall deem most conducive to the interests of the corporation, making no provision that a majority shall constitute a quorum for the discharge of the duties entrusted to them, all must be present to hear and consult when they come to distribute the stock, although a majority are competent to decide. In the distribution of the stock they act judicially; not so as to receiving subscriptions, in respect to which they act only ministerially, and it is not necessary for that purpose that even a majority should be present. *Crocker v. Crane*, 21 Wendell, 211.

**PRINCIPAL AND AGENT.** (*Fraud.*) The principal is liable, *civiliter*, for the fraud or deceit of his agent committed in the course of the agent's employment. *Locke v. Stearns*, 1 Metcalf, 560.

2. (*Broker.*) Where a broker makes a sale in the usual line of business, his representations bind his principal, although they are made contrary to the principal's express instructions; unless such instructions are known to the purchaser. Otherwise, in case of particular and special agents. *Loddell v. Baker*, 1 Metcalf, 193.

3. (*Action.*) Ordinarily, an action of trover will not lie by a principal against his agent, unless it appear that the agent has converted the property of his principal to his own use, or disposed of it contrary to his own instructions; there must be some act on the part of the agent; a mere omission of duty is not enough, though the property be lost in consequence of the neglect. Nor will trover lie where the agent, though wanting in good faith, has acted within the general scope of his powers. *McMorris v. Simpson*, 21 Wendell, 610.

4. (*Binding of former by latter.*) Where an agent compromised a claim of his principal, by receiving from a debtor money and other means of realizing a debt, and executed a release, in his own name, it was held, that such release not purporting on its face to have been made by the principal, or to have been executed by him, was not binding upon the principal as a release,

and could not be set up by the debtor in bar of a recovery in an action brought for the recovery of the original debt. *Evans v. Wells*, 22 Wendell, 324.

5. (*Same.*) But it was further held, that it was competent to the debtor for the purpose of establishing an accord and satisfaction, to prove by parol a ratification by the principal of the acts of the agent: by showing that with full knowledge of the facts he reaped the benefit of the compromise, by accepting in whole or in part, its fruits; and for that purpose to produce the release as evidence of the agreement, and show a compliance on his part with its requirements. *Ib.*
6. (*Same.*) The rule that a contract under seal entered into by an agent to be binding upon the principal, must on its face purport to have been made by the principal, and to have been executed in his name, and not in the name of the agent, is applied in all its rigor where the validity of the instrument in question depends upon the annexation of a seal; but it seems, in reference to less formal writings, such as the evidence of ordinary commercial transactions, a more liberal interpretation prevails; in such cases in furtherance of the public policy of encouraging trade, if it can upon the whole instrument be collected that the true object and intent were to bind the principal and not merely the agent, courts of justice will adopt that construction of it, however informally it may be expressed. *Ib.*
7. (*Discounting of note.*) The plaintiff, being the holder of a negotiable note indorsed in blank, delivered it, without putting his name upon it, to an agent to procure it to be discounted. The agent indorsed it in his own name, and sent it to a bank, and the messenger represented that the money was wanted for the accommodation of the agent. The bank discounted the note and passed the proceeds to the credit of the agent, and the same were then attached as his property, in the possession of the bank, on a trustee process. The plaintiff forthwith informed the bank that the note belonged to him and demanded payment of the proceeds. Held, that the bank was responsible to him therefor. *Merrill v. Bank of Norfolk*, 19 Pickering, 32.

**PRINCIPAL AND SURETY.** (*Contribution.*) A surety's cause of action against a co-surety or his representatives, for contribution, accrues when, and not before, he pays the debt of the principal. *Wood v. Leland*, 1 Metcalf, 387.

2. (*Indorsement.*) Where one not a promisee nor indorsee, puts his name in blank on the back of a note, before it is delivered to the promisee, he is an original promisor and surety, and if he pays the note, he must pursue his remedy as surety, and not as indorser, against the other promisors. *Chaffee v. Jones*, 19 Pickering, 260.
3. (*Same*) Where a note was paid by one who had thus put his name on the back of it, and he thereupon brought his action for money paid by him as indorser, against the principal and another surety jointly, and, after a trial, the action was not supported on that ground, he was not allowed to discontinue against the principal, and proceed as a surety against his co-surety for contribution. *Ib.*
4. (*Same.*) The fact that such party put his name on the back of the note at the request of the principal, and without the knowledge of a surety who had signed on the face of a note, was held not to affect his right to recover contribution of such surety. *Ib.*
5. (*Contribution.*) On the question of a contribution between co-sureties, partners who signed in the partnership name are to be regarded as but one surety. *Ib.*
6. (*Same.*) An action lies against a co-surety for contribution, without a previous notice of the payment by the plaintiff and a special demand. *Ib.*

**PROMISSORY NOTE.** (*Dishonor.*) A note payable on demand is not regarded as dishonored within one month after its date. *Ranger v. Cary*, 1 Metcalf, 369.

2. (*Consideration.*) A note given for a premium of insurance cannot be recovered, if the vessel insured were unseaworthy at the time when the risk would have commenced — the consideration having failed. *Commonwealth Ins. Co. v. Whitney*, 1 Metcalf, 21.

3. (*Grace.*) The maker of a promissory note is bound to pay it, upon demand made at any seasonable hour of the last day of grace, and may be sued on that day, if he fail to pay on such demand. *Staples v. Franklin Bank*, 1 Metcalf, 43.
4. (*Post notes.*) Post notes, issued by a bank, are payable on demand made at any time, on the last day of grace, after the known and usual hour of opening the bank for business, and may be put in suit on that day, if payment is refused. *Ib.*
5. (*Local law.*) The indorsee of a note made and indorsed in another state, must do all that is required by the law of that state to charge the indorser, before he can maintain an action against him in this state. *Williams v. Wade*, 1 Metcalf, 82.

**QUO WARRANTO.** (*Judgment in.*) Where to an information in the nature of a *quo warranto* filed against individuals, calling upon them to show cause by what warrant they exercise the franchise of maintaining a bridge across a navigable river and exacting toll from passengers, the defendants answer that they do so by virtue of an act of the legislature, authorizing the erection of a bridge in a specific form, and that they have in all respects conformed to the requirements of the act granting the franchise, upon which allegation issue is taken and found against them by the jury, judgment of ouster follows of course. *The People, ex rel., Taylor v. Thompson*, 21 Wendell, 235.

2. (*Division of county.*) Where a county is divided and two separate and distinct counties formed out of it by act of the legislature, to one of which a new name is given, whilst the other it is declared shall be and remain a separate and distinct county by the name of the county as it existed previous to the division, the judges of the county courts appointed previous to the division who happen to reside in that portion of the territory distinguished as a county with a new name, under the operation of the act requiring judges of county courts to reside within the county for which they are appointed, lose their offices, and are no longer competent to act under their commissions; whilst those of the judges who happen to reside in the portion of the territory which retains the original name, continue in office until the ex-

piration of the term for which they were originally appointed.  
*The People v. Morrell*, 21 Wendell, 563.

**REQUEST.** Where the owner of land, by a covenant which binds his heirs and assigns, engages to do a certain act when thereto requested, a written request to do such act, addressed to all the heirs or assigns, and seasonably delivered at the dwellinghouse of one of them, is sufficient; and if they neglect to do the act, they are liable to an action on the covenant.  
*Morse v. Aldrich*, 1 Metcalf, 544.

**RESTRAINT OF TRADE.** A bond conditioned, that the obligor shall never carry on, or be concerned in, the business of founding iron, is void. *Alger v. Thacher*, 19 Pickering, 51.

**REVERSION.** (*Devisable.*) The reversion expectant on the determination of an estate tail is a vested interest, which may be devised, and which will pass to a devisee under a general residuary clause in a will. *Steel v. Cook*, 1 Metcalf, 281.

2. (*Assignable.*) When the owner of such reversion limits the same by way of executory devise, on the contingency of there being issue of a future marriage of one of the tenants-in tail, the residuary devisee of the reversion may grant the same to a third person, subject to such executory devise. *Ib.*

**SALE.** (*Delivery.*) If goods in the possession of a lessee are sold, and a bill of parcels delivered to the vendee, and notice of the sale given to the lessee by the parties with a request that he will hold the goods for the vendee, this constitutes a valid constructive delivery of such goods, as against a subsequently attaching creditor of the vendor, although the lessee do not consent so to hold them. *Carter v. Willard*, 19 Pickering, 1.

2. (*Same.*) But the mere delivery of the bill of parcels, without giving notice of the sale to the lessee, is not sufficient as against a subsequent attachment by a creditor of the vendor. *Ib.*

3. (*Same.*) On a sale of partnership goods by a partner to his copartner, a delivery of the property is necessary to the validity of the sale; but such delivery consists rather in the surrender of the possession and control of the goods, than in the actual tradition of them by the seller to the purchaser. *Shurtleff v. Willard*, 19 Pickering, 202.

4. (*Same.*) On a sale of goods a delivery of a part for the whole, applies to all the goods embraced by the contract of sale, although they happen to be scattered in different and distant places. *Ib.*

5. (*Conditional.*) If goods are sold upon a condition, and the vendee fails to perform it, but retains the goods and converts them to his own use, the vendor, if he rescinds the sale, cannot waive the tort and recover the value of the goods in *assumpsit*, but his proper remedy is *trover*. *Allen v. Ford*, 19 Pickering, 217.

SALE OF CHATTELS. (*Bailment or.*) Where a contract was made between a miller and other persons, for the manufacture of wheat ~~into~~ flour, he engaging on his part for every four bushels and fifty-five pounds of wheat received, to deliver one barrel of superfine flour, and there was no stipulation or understanding that the wheat delivered should be kept separate from other grain, or that the identical wheat should be returned in the form of flour; it was held, that the transaction between the parties constituted a sale and not a bailment, and that the owners of the wheat could not maintain an action for the conversion of the flour manufactured from the wheat. *Smith v. Clark*, 21 Wendell, 83.

2. (*Conditional delivery.*) Where, under a contract for the sale of chattels, a delivery of a portion of the property sold was made to the purchaser, under an agreement that a note should be given for the whole quantity upon the delivery of the residue at a future day, the delivery of the first parcel was held to be conditional, and that on the delivery of the residue and the refusal of the purchaser to give the note and to deliver up the first parcel on demand, an action of *replevin* for the wrongful detention might be sustained. *Russell v. Minor*, 22 Wendell, 659.

SHERIFF. (*Arrest.*) An officer, who arrests a judgment debtor on execution, cannot lawfully hold him in custody against his consent, in order to procure an interview with the creditor, or his attorney, for the purpose of negotiating with the debtor, or for the purpose of the creditor's giving further directions to the

officer as to service of the execution. *French v. Bancroft*, 1 Metcalf, 502.

2. (*Same.*) If a judgment creditor direct an officer to arrest the debtor on execution, but not to commit him until further orders, the officer is justified in not arresting him. *Ib.*

3. (*Same.—Forgery of bail bond.*) An officer, who is lawfully directed to arrest a defendant on a writ, is answerable to the plaintiff, if he take a bail bond to which the sureties' names are forged, and thereupon discharge the defendant from custody. *Marsh v. Bancroft*, 1 Metcalf, 497.

SHRUBS AND TREES. (*Personal.*) ~~Shrubs~~ and trees, in land demised to be used as a nursery garden, are personal chattels, as between the lessor and the lessee and his assigns, and may be severed and removed. *Miller v. Barber*, 1 Metcalf, 27.

SLANDER. (*Representation concerning public officer to the head of his department.*) An action on the case for a libel lies against a party making a communication in writing to the head of a department of the government, charging a subordinate officer of such department with peculation and fraud of various kinds, where such subordinate officer is subject to removal by the officer to whom the communication is addressed; but such action, though in form for a libel, is in the nature of an action for a malicious prosecution, and the proof to sustain it must be the same as is required in the latter action, that is, the plaintiff is bound to show both malice and a want of probable cause. *Howard v. Thompson*, 21 Wendell, 319.

2. (*Same.*) Where the conduct of a public officer, against whom complaint is made, be such as with the attendant circumstances to excite the honest suspicion of a citizen that the officer is chargeable with a want of fidelity to the trusts reposed in him, or with fraud as it respects the government, and an action is brought against a citizen for a representation made by him respecting such officer, the question of probable cause should be submitted to the jury. *Ib.*

3. (*Same.*) Even after a notice of justification, the proof of which is abandoned on the trial, the defendant may, in an action like



this, rest his defence upon the ground of probable cause; he is precluded from doing so, under such circumstances, only where probable cause is mere matter of mitigation. *Ib.*

4. (*Privilege of counsel.*) The privilege of counsel in advocating the rights of his client, and of the party himself where he manages his own cause, in a judicial proceeding, is as broad as that of a member of a legislative body; however false and malicious may be a charge made by the counsel or the party upon such an occasion, affecting the reputation of another, an action of slander will not lie, provided that what is said be pertinent to the question under discussion; the remedy is by action on the case. *Hastings v. Lusk*, 22 Wendell, 410.

#### STATUTES, CONSTRUCTION OF. (*Change of phraseology.*)

It is a rule of construction, that a mere change of phraseology in a revision of the statutes, will not be deemed to alter the law, unless it evidently appears that such was the intention of the legislature. *Ex parte Brown*, 21 Wendell, 316.

- TRESPASS. (*Taking.*) Trespass *de bonis asportatis* is maintained by proof that the defendant unlawfully exercised an authority over the chattels, against the will and to the exclusion of the owner, though there was no manual taking or removal. *Miller v. Baker*, 1 Metcalf, 27.

- TROVER. (*Sale of stolen goods.*) An auctioneer who sells stolen goods is liable to the owner in an action of trover, notwithstanding that the goods were sold by him, and the proceeds paid over to the thief, without notice of the felony. *Hoffman v. Caron*, 22 Wendell, 285.

- TRUST. (*Capital.—Income.*) Where property, real and personal, was devised in trust, the rents, issues, and income thereof to be paid to the *cestui que trust*, and a part of the real estate was taken for a railroad, and the damages thereby caused were paid to the trustee; it was held that such damages were not income, &c. to be paid to the *cestui que trust*, but were a substituted capital, of which the interest only was payable to him. *Gibson v. Cooke*, 1 Metcalf, 75.

- VERDICT. (*Waiver of issue.*) Where a verdict, which is de-

cisive of the case, is found on one or more of several issues, and the jury cannot agree as to another issue, the party, in whose favor the verdict is found, may waive the other issue, or consent that a verdict be entered thereon against him. *Inhabitants of Sutton v. Inhabitants of Dana*, 1 Metcalf, 383.

**WARRANTY.** (*Of indorsements.*) A. agreed to procure and deliver to B. the note of W. indorsed by two other persons, and afterwards wrote to B. this letter — “I enclose you the note of W.’s, as proposed, which you will please pass to my credit.” *Held*, that this was tantamount to a warranty that the indorsements on the note enclosed in the letter were genuine. *Coolidge v. Brigham*, 1 Metcalf, 547.

**WILL.** (*Construction.*) Promissory notes and other securities for the payment of money will pass by a bequest of money, where such is manifestly the intention of the testator. *Morton v. Perry*, 1 Metcalf, 446.

2. (*Same.*) A testator, after reciting that he had sold his real estate and paid to his heirs, in cash, the largest part of their portions, and that he was making his will, “dividing the residue,” gave legacies to his wife and two of his heirs, in full of their portions: He then bequeathed to his three other heirs all the money which should be left at his decease: At the date of his will, almost all his property consisted of promissory notes and money on hand: The amount of money then on hand could not be ascertained; but he commonly had not more than twenty or thirty dollars: At his decease, he had promissory notes to the amount of more than \$2300, and only \$81 in money. *Held*, that the money due on his notes, at his decease, passed by the bequest of money left. *Id.*
3. (*Indefinite.*) A testator, after bequeathing to his wife a portion of his property, added a clause to his will, in which he requested that a person, to whom he had bequeathed nothing, might provide for her a chaise, or other suitable conveyance, and attend her whenever and wherever she might wish to go, for a suitable compensation, if she should desire it. *Held*, that

this was too vague and indefinite to be construed as a legacy to the wife. *Whipple v. Adams*, 1 Metcalf, 444.

4. (*Construction.*) B., by his will, gave to his wife, in common with his daughter, the use of certain rooms in a house, and also gave to his daughter, in common with his wife, the use of the same rooms; which use the daughter was to have so long as she should remain unmarried. *Held*, that after the death of the wife, the daughter, remaining unmarried, was entitled to the sole use of the rooms. *Jarvis v. Buttrick*, 1 Metcalf, 480.
5. (*Same.*) A clause added to a devise of a fractional part of certain land, that it is "to be taken by the devisee where he shall choose or select, at its just or proportionate value," does not constitute a condition precedent to the vesting of the estate devised; but the devisee, on the death of the devisor, becomes tenant in common, with a right of selection, to be exercised or not, at his will. *Brown v. Bailey*, 1 Metcalf, 254.

**WITNESS.** (*Forged signature.*) On the trial of an indictment for forgery, the party, whose signature is alleged to be forged, is a competent witness to prove the forgery and also the destruction of the instrument alleged to be forged, although civil actions are pending against him to which his only defence may be the forgery of said instrument. *Commonwealth v. Peck*, 1 Metcalf, 428.

2. (*Negligence of laborer.*) A hired laborer who has performed his work under the eye and immediate direction of his employer, if responsible to any one for negligence or unskilfulness, is responsible only to his employer, and being released by him, he is a competent witness in an action for negligence and unskilfulness in the performance of a contract under which the work was done. *Downer v. Davis*, 19 Pickering, 72.
3. (*Objection to competency.*) An objection to the competency of a witness should be made before he is examined in chief; but if it be not known until after such examination, it may be made in any stage of the trial, when discovered. *Shurtleff v. Willard*, 19 Pickering, 202.

## III.—MISCELLANEOUS CASES.

*In the Supreme Court of the United States, January Term, 1841.*

**SUSAN MAYBERRY, APPELLANT, v. JOHN M'PHERSON BRIEN AND OTHERS, APPELLEES.**

1. Where the words used in a conveyance import a joint tenancy, they will not be construed to intend a tenancy in common, on the ground of the object of the conveyance, unless the nature and use of the property be shown in evidence.
2. Dower is not demandable of an estate held in joint tenancy.
3. The principle, that a seizin for an instant only is not sufficient to lay a foundation for dower, is not limited to cases in which the person seized becomes so merely in carrying out a naked trust.
4. By statute, in Maryland, dower is allowed in equitable titles, under certain restrictions.

THIS was an appeal from a decree of the circuit court of the United States, for the district of Maryland, dismissing the bill in a suit in equity for dower, brought by the appellant as the widow of Willoughby Mayburry, against John Brien, and, on his decease, revived against the present appellees, his heirs at law.

The material facts, appearing by the bill and answer, and the testimony taken in the cause, were as follows. Certain real estate, designated as "the Catoctin Furnace and all the lands annexed or appropriated to it," was sold by Catherine Johnson and others, as the executors of Baker Johnson, to Willoughby Mayburry and Thomas Mayburry, for the sum of thirty-two thousand dollars, part of which was to be paid on delivery of the deed, and the residue secured by a mortgage on the estate. A deed was accordingly prepared and executed and acknowledged by the executors, on the 5th of March, 1812, and retained by them to be delivered to the grantees, on their payment of the cash part of the purchase money, and the execution of a mortgage to secure payment of the residue. On the 19th of the same month, the grantees paid the money, executed a mortgage for the residue, and received the deed of the estate; the delivery of the deed and mortgage, as was testified by

one of the grantors, being "simultaneous acts." The mortgage was subsequently foreclosed, during the lifetime of the appellant's husband, and, under the decree of foreclosure, John Brien, the original respondent, became the purchaser of the estate. On the 9th of March 1813, and previous to the foreclosure, Thomas Mayburry conveyed his undivided moiety in the estate to his cotenant, the appellant's husband, who, by a deed executed at the same time, mortgaged all his interest in the estate to his grantor as a security for the payment of certain obligations to him. The terms of the deed from the executors of Johnson to the Mayburrys imported a joint tenancy in them.

The case was argued by Mr. *Mayer*, for the appellant; and by Messrs. *Meredith* and *Nelson* (with whom was Mr. *Schley*) for the appellees.

On the part of the appellees, the appellant's claim to dower was opposed on two grounds; *first*, that the conveyance to Willoughby and Thomas Mayburry created a joint tenancy in them, and, consequently, that the appellant's husband was never sole seized of the legal title in the estate; and, *second*, that his seizin, if sole, was merely for an instant.

On the part of the appellant, it was argued: *first*, that the deed to the Mayburrys, although in terms importing a joint tenancy, must be construed to create a tenancy in common, inasmuch as the property conveyed was a furnace establishment and land incident and subservient thereto; and it is settled that real estate conveyed to several parties for partnership purposes, or which is useful only for some business, is held by the parties as tenants in common, and not as joint tenants; *second*, that the rule relating to dower in case of joint tenancy is only applicable on behalf of the survivor, and to prevent any interference with his enjoyment of the estate, and, consequently, that if the estate conveyed to the Mayburrys was a joint tenancy, the appellant's claim to dower therein can only be objected to by the other joint tenant, who is estopped from so doing by his release to her husband; and, *third*, that the principle, that a seizin for an instant only is insufficient to establish a title to dower, must be restricted to cases in which the party so seized acts simply

as an instrument in carrying out a naked trust, and ought not to be applicable to cases in which any interest, immediate or contingent, attaches to the grantee under the conveyance.

The opinion of the court was delivered, in substance, as follows, by

Justice M'LEAN. The decree of the circuit court, dismissing the bill in this case, is sought to be affirmed, on the ground, that as the conveyance to the Mayburrys created a joint tenancy, the complainant is not entitled to dower, unless, by the conveyance of Thomas Mayburry to her husband, the latter became sole seized; and that as the mortgage back to Thomas was simultaneous with the conveyance by him, the seizin of Willoughby was for an instant only, and consequently insufficient to support a claim to dower.

The counsel for the complainant, admitting that the terms of the conveyance from the executors of Johnson to the Mayburrys import a joint tenancy, insist, nevertheless, that the nature of the property, and the circumstances of the parties, show a tenancy in common; that real estate conveyed for partnership purposes constitutes a tenancy in common; and that the conveyance of this furnace, and the land incident to it, was for manufacturing purposes, and comes within this definition. No evidence being given on the subject, the counsel relies upon the above considerations, as sufficient to fix the character of the estate.

In the case of *Lake v. Craddock*,<sup>1</sup> the court held that survivorship did not take place, where several individuals had purchased an estate, which was necessary to the accomplishment of an enterprize in which they were engaged; that the payment of the money created a trust for the parties advancing it; and that as the undertaking was upon the hazard of profit or loss, it was in the nature of merchandising, in which the *jus accrescendi* is never allowed: and, in the case of *Coles v. Coles*,<sup>2</sup> it was decided, that when real estate is held by partners for the purposes of the partnership, they hold it as tenants in common; and that on a sale of the land, one of the partners, re-

<sup>1</sup> 3 Peere Williams, 159.

<sup>2</sup> 15 Johns. Rep. 159.

ceiving the consideration money, was liable to the action of the other for his moiety.<sup>1</sup>

In Maryland, joint tenancy is abolished by law ;<sup>2</sup> and it is argued, that this being the settled policy of the state, a liberal construction ought to be given to conveyances prior to that time, in order to guard against the inconvenience and hardship, if not injustice, of that tenancy. Whether this estate was purchased by the Mayburrys, for the purpose of manufacturing iron, for speculation, or for some other object, is not shown by the evidence ; and it would be dangerous for the court, without evidence, to give a construction to this deed, different from its legal import. We must, therefore, consider the property as conveyed in joint tenancy ; and the question arises whether dower may be claimed in such an estate.

Dower is a legal right, and whether it be claimed by suit at law, or in equity, the principle is the same. The rule is, that "the wife shall not be endowed of lands or tenements, which her husband holdeth jointly with another at the time of his death ;"<sup>3</sup> but it is insisted that this rule applies only in behalf of the survivor ; and, that if in this case the deed created a joint estate, the complainant may, notwithstanding, claim in virtue of the deed of release to her husband from the other joint tenant. At the time, when the deed of the estate in question was made to the Mayburrys, a mortgage was given by them to the grantors, to secure the payment of a portion of the purchase money ; and, although the deed bears a date prior to that of the mortgage, both instruments were delivered and consequently took effect at the same time. The deed by Thomas Mayburry to Willoughby, and the mortgage of the latter to the former, were also executed and delivered simultaneously. Two questions, then, arise : *first*, whether dower attaches, where there has been only a momentary seizin in the hus-

<sup>1</sup> Thornton v. Dixon, 3 Brown's Ch. Rep. 199 ; Balmain v. Shore, 9 Vesey, jr. 500.

<sup>2</sup> Statute of 1822, ch. 262.

<sup>3</sup> Co. Litt. 31 b ; 3 Kent's Comm. 37 ; 1 Roll. Abr. 676 ; F. N. B. 147 ; Park on Dower, 37 ; 3 Preston on Abstracts, 367 ; Burton on Real Property, 53.

band ; and, *second*, whether, according to the laws of Maryland, dower may be claimed in an equity of redemption.

By the common law, dower does not attach to an equity of redemption ; the fee is vested in the mortgagee, and the wife is not dowerable of an equitable seizin ;<sup>1</sup> but, in Maryland, by an act passed in 1818,<sup>2</sup> which gives dower in an equitable title under certain restrictions, the common law rule has been changed ; and, in many of the other states, a similar change has been effected either by statutory enactment, or by a judicial modification of the common law. The right of the complainant, however, depends on conveyances executed prior to the year 1818, and, consequently, is not affected by the statute passed in that year.

The mortgage by Willoughby Mayburry to Thomas, as has already been stated, was delivered at the same instant that he received the deed from Thomas ; and the question is, whether dower can be claimed by the wife on such a seizin of the husband ?<sup>3</sup>

In reference to this question, the rule, as laid down by chancellor Kent,<sup>4</sup> is, that "a transitory seizin for an instant, when the same act that gives the estate to the husband conveys it out of him, as in the case of the conusee of a fine, is not sufficient to give the wife dower ; the same doctrine applies, when the husband takes a conveyance in fee, and at the same time mortgages the land back to the grantor, or to a third person, to secure the purchase money, in whole or in part, dower cannot be claimed as against rights under that mortgage ; the husband is not deemed sufficiently or beneficially seized by an instantaneous passage of the fee, in and out

<sup>1</sup> *Dixon v. Saville*, Bro. Ch. Cases, 326 ; Co. Litt. 36 ; *Stelle v. Carroll*, 12 Peters, 205.

<sup>2</sup> Statutes of 1818, ch. 193.

<sup>3</sup> As the Mayburrys, at the time of this conveyance by Willoughby to Thomas, were joint tenants of an equity of redemption only, and the court had just decided, that dower could not be claimed in Maryland of an equity of redemption, acquired previously to 1818, it would seem to be entirely superfluous to inquire, whether the seizin of Willoughby was sufficient to entitle the complainant to dower ; inasmuch, as if the seizin had been sufficient, the estate itself was of such a nature, that she could not have been endowed of it. ED. JUR.

<sup>4</sup> 4 Kent's Comm. 38, 39.



of him, to entitle his wife to dower as against the mortgagee." This is the well established doctrine on the subject.<sup>1</sup>

The appellant insists, that the principle, which excludes dower in the case of a momentary seizin, applies only where the grantor acts in carrying out a naked trust; but this position is not sustained by the authorities. In the case of *M'Cauley v. Grimes*,<sup>2</sup> the court say, "perhaps there is no general rule, in strictness, that in cases of instantaneous seizin, the widow shall or shall not be entitled to dower;" and, again, "where a man has the seizin of an estate beneficially for his own use, the widow shall be endowed." What may be a beneficial seizin in the husband, so as to entitle his widow to dower, may be a matter of controversy, and must lead to some uncertainty. But in the language of chancellor Kent, where a mortgage is given by the grantee, at the same time the conveyance of the land is executed to him, there is no such beneficial seizin in him as to give a right to dower. The incumbrances, in the present case, it is believed, exceed the value of the estate; and this being the case, the grantees could in no sense be said to be beneficially seized, so as to sustain the claim of the complainant. Upon the whole the decree of the circuit court is affirmed.

<sup>1</sup> *Holbrook v. Finney*, 4 Mass. Rep. 566; *Clark v. Munroe*, 14 Mass. Rep. 352; *Stow v. Tift*, 15 Johns. Rep. 485.

<sup>2</sup> 2 Gill & Johns. Rep. 324.

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*In the District Court of the United States, for the District of  
Maine. February, 1841.*

#### THE DAWN.

1. The libellant shipped for a voyage from Boston to Turk's island. The ship soon after leaving port was so much damaged by the fortune of the seas, that the master, for the safety of the lives of the crew, put into Bermuda, where a survey was called, and she was condemned and sold as a wreck, and her crew discharged. Wages were paid to the libellant until he arrived at Bermuda. By his libel he claimed either the two months wages allowed to seamen on the sale of a vessel in a foreign port and the discharge of the crew, by the act of congress of February, 1803, chap. 63; or a sum in addition to his wages to pay his expenses home.

2. Ruled, that the act of congress applies only to the case of a voluntary sale of a vessel, and not to a sale rendered necessary by misfortune, and that the libellant was not entitled to the statute allowance, but was entitled to a sum in addition to his wages to defray the expenses of his return home, to be paid from the proceeds of the sale of the vessel.
3. In case of shipwreck, the seamen are by the maritime law bound to remain by the vessel and exert themselves to save all that is possible of the ship and cargo.
4. When they do this they are entitled to their full wages, without deduction, against the materials which they save of the ship, if enough is saved to pay them.
5. And they are entitled to a further reward in the nature of salvage against the whole mass of property saved.
6. Their claim is not as general or volunteer salvors, nor are they entitled to an equally large salvage; but they are entitled to a reasonable allowance, *pro opera et labore*, according to the circumstances of the case and the merits of their services.
7. When the disaster happens in foreign parts this ought not to be less than the expenses of their return home.

THIS case was before the court several terms ago, and is reported in Ware's Reports, 425. After the opinion was then delivered, the counsel for the respondent moved the court to suspend the decree, to enable the party to offer further evidence to show the actual condition of the vessel, when she arrived at Bermuda. Under the circumstances of the case, the court allowed the motion. The case was now presented on the new evidence. The material facts upon the whole case were as follows. The libellant shipped on board the brig Dawn, at Boston, November 26, 1836, as mate, for a voyage to Turk's island, for wages at twenty-five dollars a month. Soon after the brig left port she encountered violent gales, by which she was so much damaged in her hull and rigging, as to be incapable of continuing the voyage, and the master, for the safety of the lives of the crew, bore away for Bermuda, where she arrived on the 28th of December. The master then made his protest, and applied for a survey. Commissioners were appointed for that purpose by the governor, who, after an examination, reported, that from the great damage which the brig had received in her spars and rigging, and especially from the disabled state of her hull, connected with her great age, she was unfit for sea and

unworthy of repair; and she was subsequently sold as a wreck. The additional evidence, now introduced, went to confirm the report of the surveyors and to prove the ruinous condition of the vessel, and to show further the great expenses of the repairs, which would be required to fit her for sea.

The crew were discharged and paid their wages up to the time of the discharge. The libellant claimed in addition two months wages allowed by the act of congress of February, 1803, sect. 3, upon the sale of a ship and the discharge of her crew in a foreign port, or upon the discharge of a seaman in a foreign country with his own consent; and if under the circumstances of this case he was not entitled to claim under the statute, an alternative claim was set forth in the libel for a reasonable compensation, in addition to his wages, in the nature of salvage for his extra labor and services in saving the vessel and to pay his expenses home.

The case was argued by *C. S. Davis* for the libellant, and *T. A. Deblois* for the respondent.

WARR, district judge. I do not think it necessary on this occasion to say much upon the claim for the statute allowance of two months' additional wages, which are directed to be paid to the consul for the seamen's use on the sale of a vessel in a foreign port, or when a seaman is discharged in a foreign country with his own consent. When this case was before the court at a former term, that question was fully considered, and the conclusion to which my judgment was brought by that examination, was that the statute applied only to the case of a voluntary sale of the vessel, and to a strictly voluntary discharge of a mariner, and not to a sale or discharge rendered unavoidable by an imperious and overruling necessity. But when a vessel is sold in a foreign port, the case is within the words of the statute, and if the owners would exempt themselves from its operation it belongs to them to show that the sale was involuntary on their part. As the evidence then stood, it did not appear to me that the necessity of the sale was sufficiently established by the proof; but, under the peculiar circumstances of the case, it seemed to be reasonable to suspend the decree, and allow the owner to offer further evidence to that point.

The evidence now produced does in my opinion satisfactorily show that the sale was, in the reasonable meaning of the word, a sale of necessity. Not that it was physically impossible to repair the vessel and proceed on the voyage; for it is always possible to repair or rebuild a vessel, while any part of the hull remains. But the damages were so extensive, and the expense of the repairs would have been so considerable, that it was beyond question greatly for the interest of those, on whom the loss must ultimately fall, to abandon the voyage and sell the materials preserved for the most they would bring. A sale is within the mercantile and reasonable sense of the word necessary, when the vessel cannot be repaired, but at a great sacrifice of the interests of the owners. And when a voyage is broken up for such cause, the seamen are not properly discharged, but the whole enterprise is brought to a premature conclusion by a fortuitous event, for which neither party is responsible.

The other question raised by the pleadings in this case is — whether upon a shipwreck and loss of the vessel in a foreign country, the seamen, who have remained by the ship and faithfully performed their duty to the last, can upon the principles of the maritime law claim a compensation, out of the property which they save, beyond their stipulated wages up to the time, when their connection with the ship is finally dissolved, sufficient to pay their expenses home. This question has been very ably and elaborately argued on both sides; and the authorities bearing upon it have been widely examined. But with all the researches of counsel no adjudged case has been found, in which the question has been directly and formally decided.

It is contended by the counsel for the libellant that this claim is founded on an ancient principle of the maritime law of Europe, incorporated into the earliest digests of the law, and recommended as well by the dictates of justice and humanity as by an enlarged and enlightened public policy; that if it is not directly sanctioned by any judicial precedents, neither are there any by which it is directly negatived; but that there are cases in which a compensation in the nature of salvage may be allowed beyond the amount

of wages due, is fairly inferrible from the doctrines of many of the adjudged cases ; and it is in fact but a just application of the general principle of the marine law, which studiously connects the interest of the crew with the safety of the vessel and cargo. On the other side, it is argued that the claim cannot be supported as one flowing from the contract, all rights under that being satisfied by the payment of wages up to the time when the contract was dissolved by an accident of major force ; that it cannot be maintained as a salvage reward, because the ship's company can, it is said, in no case claim as salvors, being bound by their contract to use, on these melancholy occasions, their utmost exertions for the preservation of the ship and cargo for their stipulated hire ; and the silence of our jurisprudence on a question, which must have frequently been presented to the court, has been strongly urged as a proof that no such principle, as that contended for in behalf of the libellant, is acknowledged by the maritime law of this country. And it is further contended, admitting the rule of the maritime law to be that upon a shipwreck in foreign parts, the crew are entitled to claim against the savings from the wreck a sum sufficient to pay their expenses home, that this rule is superseded in this country by the acts of congress for the relief of destitute mariners in foreign countries, requiring the consuls of the United States to provide for their return at the public expense. Such I understand to be the general tenor of the arguments at the bar.

I agree with the counsel for the respondent that by the maritime law, as it is received in this country, the seamen are bound to remain by the wreck, and contribute their utmost exertions to rescue as much as possible from the violence of the elements, so long as there is a reasonable probability of saving any thing without too much hazard of life. It is true that a different view is taken of the obligations of the crew by the most distinguished maritime jurists of France. Valin says, that in case of shipwreck the seamen are at liberty to abandon the ship, although he admits that his opinion is in opposition to the decision of the judgments of Oleron and the ordinance of the Hanse Towns. The reason, he says, is that in this case the owner is under no personal obligation

to pay their wages or the expenses of their return home, and consequently if they refuse to aid in saving the property he has no cause of complaint.<sup>1</sup> Pothier maintains the same doctrine. By the accident of major force, he says, which prevents the continuation of the voyage, the parties are freed from their engagements, and the seamen are no longer under any obligation to continue their services.<sup>2</sup> Boulay Paty without being very explicit seems silently to acquiesce in the same conclusion.<sup>3</sup>

But notwithstanding the imposing authority of these great names, it appears to me that this doctrine is exposed to very grave objections. It is true indeed as a general principle, when the performance of a contract is rendered impossible by a fortuitous event, that the parties are freed from its obligations. And in this case the prosecution of the voyage having, by an accident of major force, become impossible, the seamen are undoubtedly discharged from the principal obligation of the contract, that of performing the voyage. But as incidental to that, they are bound at all times to exert themselves for the preservation of the property entrusted to their care. It would be singular if they were released from this collateral obligation on the happening of an event, which rendered it peculiarly necessary. It appears to be a duty resulting directly and necessarily from the nature of their engagement to render their utmost exertions on these occasions to save all that is possible for their employers. This duty is expressly enjoined upon them in nearly all the old maritime ordinances. The law is so stated by Abbot in his treatise on Shipping.<sup>4</sup> And so it has I believe been uniformly held in this country.<sup>5</sup> So long as these services are continued their right to wages under the contract remains in full force, and their lien against the fragment of the wreck which they preserve. But by abandoning the wreck they forfeit their

<sup>1</sup> *Comm. sur Ordonnance de la Marine*, liv. 3, tit. 4, art. 9, vol. i. 704.

<sup>2</sup> *Contrats Maritimes*, No. 127.

<sup>3</sup> *Cours de Droit Maritime*, vol. ii. 230, 231.

<sup>4</sup> Part 4, Ch. 2, Sect. 6.

<sup>5</sup> 2 Peters's Ad. R. 395; 2 Mason's R. 337.

wages, nor will their right be restored should the wreck be saved by other hands.<sup>1</sup>

But the question presented in this case is, whether the seamen can claim any thing beyond the full amount of wages up to the time of the actual termination of their services. It is quite clear that this claim cannot be maintained upon the common principles applicable to the contract of hiring. Having agreed to perform the service for a stipulated price, they cannot maintain a claim for extra compensation, although by some fortuitous event, that service may have been rendered more laborious, or have involved more danger than was anticipated. However just and reasonable such an allowance may in some cases be, as a pure question of casuistry, it cannot be sustained upon any established and known principle of law. Do then the principles and policy of the maritime law furnish any ground for making an exception, in favor of maritime services, to the general rule of the common law? After an attentive consideration of the subject and an examination of all the sources of information within my reach, I am brought to the conclusion that to some qualified extent they do; and I will now proceed to explain somewhat at large the grounds upon which this opinion is founded.

No case was cited at the bar, in which this question has been decided, at least in the form in which it is presented in this case. There are, however, several, in which the general subject of the claims of seamen in case of shipwreck, against the fragments which they save, is considered. Chancellor Kent in his Commentaries, in speaking of shipwreck in connexion with wages, says that "some of the decisions in this country seem to consider the savings of the wreck as being bound for the arrears of seamen's wages and for their expenses home."<sup>2</sup> Here the expenses home are spoken of as a charge on the wreck, in addition to the arrears of wages. And I refer to this paragraph, not so much as an authority in support of the doctrine, as to show that the idea, that the crew may be entitled

<sup>1</sup> 3 Kent's Comm. 196; 2 Mason's R. 347, *The Two Catherines*, 3 Sumner's R. 67, *Pitman v. Hooper*.

<sup>2</sup> 3 Comm. 195.

to something, beyond their wages, is not such a novelty in our jurisprudence, as was supposed at the argument. In the case of the *Two Catherine's*,<sup>1</sup> the vessel had performed her outward voyage and earned freight, and was wrecked, and the cargo totally lost on her return in Narraganset Bay, near her home port. The libel was framed with a double aspect, claiming in the alternative wages or salvage. The question, what was due to the crew, appears to have been elaborately argued at the bar, and was profoundly examined by the court. The conclusion of the court was, that no wages were due, but that the crew were entitled to salvage against the materials, which they had saved of the vessel. The court held that there was no principle of law which authorized the position that the character of seamen creates an incapacity to assume the character of salvors, and that the salvage should never be less than the amount of wages, which would have been due had no disaster happened, but may according to the circumstances of the case, be more.<sup>2</sup> I am aware of the language used by the same learned judge in delivering the opinion of the court in the case of *Hobart v. Drogan*.<sup>3</sup> But it does not appear to me inconsistent with the decision of this case nor to take from its authority.

In the case of the *Cato*,<sup>4</sup> the ship was lost at sea, and the crew taken from the wreck by another vessel. Part of the crew of the *Cato* assisted that of the salvor vessel in saving a portion of the cargo, and they were allowed to claim, as subordinate and auxiliary salvors, one half the share that was allowed to the crew of the salvor ship. Judge Peters observed, in delivering his opinion in that case, that "the third article of the laws of Oleron has been produced, together with the commentaries upon it, to show that seamen saving from a wreck are entitled to a reward, when sufficient property is saved, beyond the amount of their wages. I have," he says, "never disputed the doctrine in cases to which it seemed applicable." In another part of his opinion he adverts to a previous decision he had made in the case of the *Belle Creole* upon a state of facts similar to those of the *Cato*, and says, "I do

<sup>1</sup> 2 Mason, 319.

<sup>2</sup> 10 Peters, 122.

<sup>3</sup> P. 332—340.

<sup>4</sup> 1 Peters's Ad. R. 42.



not exactly recollect by what rule I estimated the quantum of wages I ordered to be paid out of the surplus to the officers and crew of the Belle Creole, but I think it was beyond the amount of wages." I shall have occasion presently to remark particularly on the third article of the laws of Oleron, and it will be seen how it applies to the present case. The case of the Catherine Maria,<sup>1</sup> was that of a vessel foundered at sea. A part of the cargo was saved by the aid of another vessel, in which the crew was brought home. Salvage was allowed to the crew of the salvor vessel, and the crew of the lost vessel were allowed their wages from the property saved, which was part of the cargo, not only to the time of the abandonment of the ship, but to the time when the goods were brought into port and were taken into the custody of the marshal under the process of the court. In the case of the brig Sophia,<sup>2</sup> the vessel was wrecked on her return voyage to Philadelphia, on the capes of the Delaware. The cargo was entirely lost, but some of the spars and rigging of the vessel were saved. The seamen filed a libel against the relics of the vessel for their wages, and the mate a separate libel claiming salvage. The court held, that the claim for wages could not be sustained, on the ground that freight is the mother of wages, and that when the freight is entirely lost, no wages *ex nomine* are due. But it was further decided, that although nothing could be recovered as wages, the seamen were entitled to claim as salvors, and that the amount, which would have been due as wages, had the disaster not happened, might be recovered as salvage. The libel of the seamen was therefore dismissed, and the mate recovered the amount of his wages under the title of salvage.

All these cases clearly sustain the principle, that the seamen in the event of shipwreck, are entitled to claim, against the property, which they have saved, in the quality of salvors. It is true, that in the case from Gilpin, this seems to be treated as a substitute for the claim of wages, and to be measured by the amount which would be due if the disaster had not occurred. In the other cases,

<sup>1</sup> 2 Peters's Ad. Rep. 424.

<sup>2</sup> Gilpin's R. 77.

it is clear that the court thought it might exceed that amount, and in that of the *Catherine Maria* more was in fact awarded. And if the claim is valid for salvage, it would seem, as in all other cases of salvage, it must be discretionary as to the amount, to be determined by the particular circumstances of the case. But all these cases are open to one general remark, which may be thought to detract something from their authority in support of the principle contended for in the case at bar; it is this, that it seems to have been tacitly assumed, that the wages were lost by the calamity, which prevented the earning of freight, and therefore, if the seamen could not be rewarded for their services in the way of salvage, they could claim nothing. Undoubtedly, it was formerly the doctrine of the English courts, that freight was the only fund out of which wages could be claimed, and of course when freight was not earned, no wages were due.<sup>1</sup> But that is now overruled in England,<sup>2</sup> and it was never received in this country but with material qualifications. Freight is indeed the natural fund for the payment of wages, and the seamen have a privileged claim against it. It is a right which does not stand merely on a dry rule of positive law, but is derived from the nature of things, for it is in part the product of their own labor. But, by the maritime law, the ship is as much pledged for wages as the freight.<sup>3</sup> When the interests of third parties are involved, as between underwriters, when the ship and freight are insured by separate policies, it would seem, upon principles of natural law, that the freight ought first to be exhausted, and the vessel resorted to only as a subsidiary fund when the freight proved insufficient. This was the opinion of Emerigon,<sup>4</sup> and in a proper case the court may perhaps have the power of marshalling the funds to meet the claims of natural justice. But at all events, the seamen are to be paid their wages, when enough for that purpose is saved of the ship or freight.<sup>4</sup> It is not pretended that these authorities establish the principle as a settled rule of jurisprudence in this country, that upon ship-

<sup>1</sup> Holt, *Law of Shipping*, 275.

<sup>2</sup> 1 Hagg. R. 227, *The Neptune*.

<sup>3</sup> *Traite des Assurances*, Art. 17, Sect. 11, 53.

<sup>4</sup> 3 Sumner's R. 60; *Pitman v. Hooper*.

wreck, when part of the property has been saved to the owners by the exertions of the crew, they are entitled to an allowance in the nature of salvage beyond the amount of their wages. But to me they seem to prove, at least, that the opposite rule is not established, and that the question is fairly open to be decided upon principle and the authority of the general maritime law.

We will now inquire what grounds it has for its support in the general doctrines of that law. The policy of connecting the interest of the crew with the safety of the ship and cargo is deeply imbedded in the principles of the maritime law. The ship and freight are the only pledge they have for their wages. Their lien upon these and upon every part of them, attaches as a privileged hypothecation *tota in toto et tota in qualibet parte*, or, as it has been emphatically expressed, to the last plank of the ship and to the last fragment of the freight.<sup>1</sup> But this is the whole of their security. If the ship and freight are wholly lost, there is a total loss of wages; and though the ship may be lost on the most distant and inhospitable shore of the ocean, they are not only left penniless to find their way home as they can, but when through many hardships they have arrived there, however long and perilous their service may have been, they have no personal claim against the owner, unless freight in the course of the voyage has been saved and put on shore. Upon the common principles of the contract of hiring service or labor, the title of the laborer to his reward depends on the faithful performance of the service, for which he is engaged, and is not liable to be defeated by the accidents of fortune.<sup>2</sup> The principle which attaches the right to wages to the fortune of the vessel, or in other words, makes the right dependent on the successful issue of the enterprise, for which the men are hired, is a peculiar feature of the modern maritime law. No trace of such a principle is to be found in the Roman law, nor in the maritime legislation of the eastern empire, nor in

<sup>1</sup> Jugemens D'Oleron, art. 3; Consulat de la Mer. ch. 132, (edition of Pardessus, 92); Emerigon Des Assurances, ch. 16. sect. 11, 2; Pitman v. Hooper, 3 Sumner's R. 50.

<sup>2</sup> 2 Kent's Comm. 590—1; Pothier Contrat de Louage, No. 423.

that ancient compilation, which goes under the name of the Rhodian laws.<sup>1</sup> It owes its origin to the necessities and peculiar hazards, which maritime commerce had to encounter in the middle ages, when to the dangers of the winds and waves, were added the more formidable perils of piracy and robbery. The principle having been then established, and found by experience to be favorable to the general interest and security of commerce, it has been preserved in the maritime jurisprudence of Europe, when the special necessities in which it had its birth have ceased to exist.

It is then to the maritime customs and usages of the middle ages, in which this restriction upon the right of wages had its origin, that we are to look for its nature and quality, as well as for any countervailing advantages to the seamen, by which this abridgment of the rights naturally resulting from their contract was compensated, and the scales of justice, which were made to incline in favor of the employer, were equitably readjusted. If we retain the harsher principles of the old law, it is but just that we should also preserve the temperaments, by which its severity and apparent injustice were mitigated.

The earliest monument of the maritime jurisprudence of the middle ages which remains, unless we except the consulate of the sea, is the judgments of Oleron. The rule is there stated in these terms: "When a vessel is lost, in whatever place it may be, the seamen are bound to save all they can of the wreck and cargo. In this case the master shall pay them their reasonable wages, and the expenses of their return home, so far as the value of the things saved is sufficient; and if he has not money enough, he may pledge the objects saved to bring them back to their country. If the seamen refuse to labor for the salvage, there is nothing due to them, and, on the contrary, when the ship is lost, they lose also their wages."—Art. 3. The rule cannot well be more explicitly declared than in this article. If the ship is totally lost, the seamen lose their wages; but, against the effects which their exertions have rescued from destruction, they have a claim not only for the

<sup>1</sup> Pardessus, *Lois Maritimes*, vol. 1, p. 325, note 3.

full amount of their wages, for that I understand to be meant by their reasonable wages, but also for a further sum to defray their expenses home. Thus we see that in the very origin of the custom which restricted the right of seamen for their wages to the effects which they saved, it was connected with another of allowing them against these effects an additional reward for their labor in saving them.

The judgments, or rolls, or, as they are more frequently called in this country, the laws of Oleron, do not appear, at first, especially, to have been sanctioned by any direct act of legislation. They are apparently a collection of maritime usages, to which custom had given the force of law; but they have at all times been referred to as of high authority by all the most commercial nations of Europe. They were the earliest digest of maritime law in the western part of Europe; and from the general wisdom and equity of their decisions, as well as from other causes, they seem, in one form or another, to have been early incorporated into the maritime jurisprudence of all the western nations of that continent. Being a work of French origin, they were received as common law in Aquitaine, Brittany, Normandy, and the whole extent of the Atlantic coast of France. In England they early acquired nearly the same authority, from an opinion there entertained, that they were originally compiled and published by Richard I., in his character of duke of Aquitaine, on his return from the holy land. In the latter part of the twelfth century, they were adopted by Alphonso the wise, king of Castile and Leon, and thus became the law of the northern coast of Spain.<sup>1</sup> They were at an early period translated and adopted as the maritime law of Flanders, under the names of the judgments of Damme and the laws of West Capelle.<sup>2</sup> The third article above quoted is in its substance incorporated into the ordinance of Philip II., of 1563.<sup>3</sup> In the more northern countries, this code does not appear to have been received as common

<sup>1</sup> Pardessus, *Collection des Lois Maritimes*, vol. 1, pages 301 and 306; Vol. 2, page 29; 1 Black. Comm. 418; 2 do. 423.

<sup>2</sup> Pardessus, *Lois Maritimes*, vol. 1, chap. 9.

<sup>3</sup> Part 4, art. 12; 4 Pardessus, 24.

law ; but the general principles and usages which it established were incorporated into their own ordinances. The whole of the first twenty-five, which were the primitive articles, are transferred to the ordinance of Wisbuy, from the fifteenth to the thirty-ninth article. The seventeenth article of the laws of Wisbuy is almost a literal translation of the third of Oleron. The Hanseatic ordinance, without copying so closely the article of Oleron, arrives at nearly the same conclusion. In case of shipwreck, the crew are required to assist the master in saving the wreck and cargo for an equitable compensation in salvage, to be taken from the wreck and the merchandise, according to the judgment of arbiters. If the master has not money, he shall carry the seamen back to their country if they choose to follow him. But if the seamen do not assist, the master is not bound to pay them any thing, and those, who have not done their duty, are liable to corporeal punishment. Where the ship perishes, the whole that is saved is pledged to pay the totality of the wages.<sup>1</sup> The law of Denmark requires the master and crew to save the ship and her rigging as well as the cargo, and a compensation shall be paid them according to the opinion of good men. On the other hand, the freight due from the shippers on the merchandise saved, as well as the wages of the crew, shall be paid in proportion to the part of the voyage performed. The mariner, who will not aid in saving the ship and cargo shall lose his wages, even what has been advanced, and be regarded as infamous.<sup>2</sup> The same rules are established by the laws of Hamburgh. The crew are bound to exert themselves to save the vessel and cargo for an equitable recompense, and if they refuse their assistance, the master shall pay them neither their wages nor any thing else.<sup>3</sup> The law of Lubec substantially agrees with that of Hamburgh. It requires the master and crew to exert themselves to save the vessel and cargo, and allows them an equi-

<sup>1</sup> Ordinance of 1614, tit. 4, art. 29, and tit. 9, art. 5 ; Ordinance of 1591, art. 45.

<sup>2</sup> Code of Frederic II., 1561, art. 24 ; Pardessus, *Lois Maritimes*, vol. 3, p. 250.

<sup>3</sup> Statute of 1603, tit. 17, art. 1 ; 3 Pardessus, 395.

table compensation, to be determined by arbiters. He who does not assist shall be paid nothing, and shall besides be deprived of his wages.<sup>1</sup> The Prussian law also enjoins the same duties upon the crew, and requires the merchant to pay them a liberal reward, *honestum premium viri boni arbitrio*.<sup>2</sup> The maritime code of Charles XI., of Sweden, as well as several of the ordinances of the northern nations, prescribes particularly the course to be pursued by the master on these occasions. He shall first save the crew, then the rigging of the ship, and lastly the cargo; for the saving of which he shall employ the boat and the services of his crew, for an equitable compensation. When the ship and cargo are entirely lost, the master and crew can demand nothing that is due to them. But if they save of the wreck the amount of their wages, they shall be paid without deduction. No one shall have reward for a salvage who has not aided; and he who has saved effects, may detain them until he is paid.<sup>3</sup> And, finally, the maritime legislation of Russia inculcates the same principles, imposing on the crew the obligation of saving what they can from the wreck, and giving them an equitable compensation for the salvage.<sup>4</sup>

The French ordinance of marine of 1581 was framed upon a review of all the antecedent maritime legislation of Europe, improved and corrected, it is said, by information sought from practical men in every part of the continent. And so admirably was the task executed by the great man who digested it, that from its first publication it was generally acknowledged as constituting in some sort the text of the commercial law of all nations. In this celebrated code, we find the same principles established and confirmed. When the ship and merchandise are entirely lost, it is followed by an entire loss of wages. But if any part of the vessel is saved, the seamen engaged for the voyage or by the month shall be paid their wages. If merchandise only is saved they shall be paid their wages in proportion to the freight received. But at

<sup>1</sup> Official Code, 1586, tit. 3, art. 3; 3 Pardessus, 444.

<sup>2</sup> Code of the Duchy of Prussia, 1620, lib. 4, tit. 12, art. 3, § 3.

<sup>3</sup> Code of Charles XI., 1667, part 5, chap. 2; 3 Pard. 170.

<sup>4</sup> Statute of Riga, 1672, tit. 5, art. 1; 3 Pard. 520.

all events they shall be paid for their days employed in saving the wreck and the effects shipwrecked.<sup>1</sup> The same principles are preserved in the code of commerce.<sup>2</sup>

It is certainly a little remarkable, in passing to the southern coast of Europe, that we find but very slight traces of a custom that seems from the earliest times to have prevailed on the Atlantic coast, that of allowing to the crew something in the nature of salvage from the property they save from the wreck. There is one chapter in the consulate of the sea, from which perhaps a custom may be inferred of allowing to seamen the expenses of their return home, when the vessel is lost on a foreign coast. It provides that when a ship sails to the countries of the Saracens and falls into the hands of enemies or is lost by the fortune of the seas, if the master receive no freight, he shall not be bound to pay the seamen anything. "The master, says the consulate, who, by one of the causes mentioned, loses his vessel, is not obliged to furnish the means of passage nor provisions for the seamen till their return to a christian country, because he has lost all he had and peradventure more."<sup>3</sup> The reason given for exempting the master from the charge, in this case, leaves room for the conjecture, that if part of the wreck had been saved by the crew, they might by custom be entitled to some allowance from it. The law of Genoa provides, when any disaster happens to a Genoese vessel, that the crew shall be bound to remain with the master and assist in the salvage, and that the master shall provide for their board and pay them double wages while they are employed in this service.<sup>4</sup> This is all I have been able to find in the legislation of those countries which border on the Mediterranean, indicating the existence of such a custom; while the ordinance of Peter IV. of Aragon and Valentia, by its silence, seems to negative it. It allows the seamen their wages in these cases to the time of the expiration of their service, provided they exert themselves to save the wreck and cargo, but nothing more, and visits upon their refusal to aid the penalty of the forfeiture of all wages, even of that which has been paid in advance.<sup>5</sup>

<sup>1</sup> Liv. 3, tit. 4, art. 8, 9.

<sup>2</sup> Art. 52—61.

<sup>3</sup> Chap. 228, edition of Pardessus, 194.

<sup>4</sup> Statutum 1441, chap. 94; Pard. vol. iv., 519.

<sup>5</sup> Ordinance of 1440, art. 17; 5 Pard. 357.



From this review of the maritime legislation and jurisprudence of Europe, and more particularly of the western nations of Europe, commencing with the Judgements of Oleron in the twelfth to nearly the close of the seventeenth century, we find, either by positive ordinances, or by immemorial usages, having the force of law, one prevailing rule applying to the case of shipwreck upon the whole extent of the Atlantic coast. It required the ship's company, in case of disaster, to exert themselves to the utmost of their ability to save as much as possible of the ship and cargo, generally under the penalty for the refusal or neglect to perform this duty, of a forfeiture of wages, and in some cases of additional punishment; but restricting their claim for wages to the effects which they save, and allowing them against those effects some reward beyond the amount of their wages stipulated by the contract. These principles seem to have been incorporated into the early law of every maritime state on the Atlantic coast, from the extreme west of the Spanish peninsula to Sweden, including the ports of the Baltic. Such a general concurrence, of itself, raises a strong presumption that they are, taken together, founded in justice and wisdom. But independent of the authority of general usage, these principles appear to me to have their foundation in just and enlightened views of public policy, their object being to connect the fortune of the crew with that of the vessel, and thus fortify the obligations of social duty by the ties of pecuniary interest. They are strongly maintained by Mr. Justice Story, in the case of the *Two Catherine's*, before referred to. "In my judgment" says he, "there is not any principle of law which authorizes the position, that the character of seamen creates an incapacity to assume that of salvors; and I cannot but view the establishment of such a doctrine as mischievous to the interests of commerce, inconsistent with natural equity and hostile to the growth of sound morals and probity. It is tempting the unfortunate mariner to obtain by plunder and embezzlement, in a common calamity, what he ought to possess upon the purest maxims of social justice."<sup>1</sup> The rule which restricts the claims of seamen for wages, to the effects, which they save, is one of naked policy;

<sup>1</sup> 2 Mason, 332.

but that which allows them against these effects some reward beyond their wages, seems to me to be founded in a principle of natural equity, that is, that when property has been rescued and saved to the owner from extraordinary perils by extraordinary exertions, the fund, which is thus saved, owes something to the hand which has preserved it. If it be said, that the services, by which it is saved, were due under the contract, the nature of that contract ought also to be considered. Upon principles of public policy, contrary to natural justice and the general law of the contract of hiring in all other cases, if the ship is totally lost without any fault of the mariner, he loses his entire wages. But if a mechanic is hired to build a house, and before it is finished, the building is destroyed by an earthquake or burnt by lightning, he is not on this account the less entitled to his wages.<sup>1</sup> Or if workmen are employed to build a dike, and before the work is accepted by the employer it is destroyed, not from any fault of the workmen, but from the defect of the soil or any other extraneous cause, the laborer is still entitled to his hire.<sup>2</sup> The loss in such cases falls upon the owner or employer; and justly, for the whole profits, on the successful issue of the enterprise, would have gone to him. It is not so with the seaman. He can be paid only from the fund, which he has brought home to the owner; and his compensation is made dependent on the accidents of fortune, as well as on his own fidelity. It is no more than a just compensation for this inequality of the contract, when, by extraordinary exertions of skill and intrepidity, he has saved the fortune of his employer from extraordinary perils, that these labors should be acknowledged by some reward beyond his stipulated wages.

And the policy of the principle appears to me to be as clear as its justice. It is a reward held out to induce the crew to persevere and exert the utmost of their skill and courage, even beyond what a court might think itself justified in requiring under their contract, to save what otherwise would be irretrievably lost to the owner. If they can look to nothing beyond their wages they will naturally be inclined to relax their efforts, when enough has been saved for that purpose. They will also naturally turn their attention exclusively

<sup>1</sup> Dig. 19, 12, 59.

<sup>2</sup> Dig. 19, 2, 62.

to saving that which is pledged for their wages, that is the ship, to the neglect of the cargo. An observation of judge Peters, whose extensive experience as a maritime judge entitles his opinion on subjects of this kind to great consideration, is well deserving of attention. In the case of the *Cato* he remarked, "there is a mistake, evidenced by some of the counsel in this and other salvage cases, as to the principles regulating the payment of wages to the seamen in the cases of wreck. The old law was that they were payable only out of such parts of the wreck of the ship, her cables and furniture, as were saved; but it was found that under this impression the mariners were occupied in saving those articles, from which they derived an advantage, and to ensure this they suffered the goods to perish. Modern authorities are clear, that both ship and cargo or such parts as are saved are alike responsible; though it should seem that the old fund, namely, the part of the ship's materials or furniture saved, should be exhausted before the cargo be made answerable." The mind of judge Peters seems to have been vibrating between wages and salvage. Sometimes he calls the claim by one name and sometimes by the other. It seems to me that the seamen in these cases have two distinct claims, one for wages and another for salvage. Their wages are to be paid exclusively from the materials of the ship, they being specially pledged for that purpose, and the full amount due is to be paid without deduction. But they have no claim for wages against the cargo, except for the freight due upon it. Their claim for salvage is against the general mass of the property saved, and, as in all cases of salvage, the amount is uncertain, depending upon the particular circumstances of the case.

Upon the whole, after the best consideration that I have been able to give to the subject, it appears to me that on these melancholy occasions, the crew are bound to remain by the vessel and contribute their utmost exertions to save as much as possible from the wreck; that if this is done they are always entitled to their full wages if enough is saved for that purpose; but if they abandon the wreck and refuse to aid in saving it, their wages are forfeited. But that they may not rest satisfied with saving what is merely suffi-

cient to pay their wages, and may be induced to persevere in their exertions so long as the chance of saving any thing remains, the law, from motives of policy, allows them, according to the circumstances and merits of their services, a further reward in the nature of salvage. The wages are to be paid exclusively from the materials of the ship, but the salvage is a general charge upon the whole mass of property saved. It is not, however, intended to be said that they can claim as general salvors, that is, as persons, who being under no obligation to the ship, engage in this service as volunteers, or that they are entitled to be rewarded at the same liberal rate.

Such a rule might sometimes increase the hazards instead of contributing to the safety of commerce. A crew who had, from any cause, become dissatisfied with their officers, or owners, might be willing to see the vessel placed in danger at the risk of some personal peril to themselves, in the hope of obtaining a large reward for rescuing her. But they are to be allowed a reasonable compensation *pro opera et labore*, as the rule is laid down in many of the old ordinances *boni viri arbitrio*. If the disaster happens in a foreign country, it ought to be at least a sum sufficient to pay the expenses of their return home. Such, I think, are the principles of the general maritime law. And if they have not been directly, and to their full extent, sanctioned by any judicial decision in this country, the reasoning of the courts, in the cases which have been cited, appear to lead to the same conclusion.

But it was contended at the argument, whatever may be the doctrines of the general maritime law on this subject, that it has been superseded in this country by the acts of congress, which provide for sending home destitute seamen from foreign countries, at the public expense. The argument proceeds on the ground, that the only motive for this allowance is to furnish the seamen the means of returning home. But the maritime law, as we have seen, places it upon a broader foundation, that of general commercial policy as well as the intrinsic equity of the claim. It never could have been the intention of these statutes, made for the benefit and relief of seamen, to abridge any of the rights derived from their service under the general maritime law. They have their origin in a great

principle of public policy, that of preserving to the country the services of this most useful but most improvident and often destitute class of citizens.

The case at bar was not one of absolute shipwreck, but rather what has been called *semi-naufragium*. The vessel was brought into port in so damaged a condition, and requiring so large an outlay in repairs to refit her for sea, that for the interest of the owner she was sold as a wreck. Between the owners and the crew she must be considered for the purposes of this case either as a wreck, or not a wreck. Upon the latter hypothesis, the sale must be considered as voluntary, and then the two months wages under the statute will be due. On the other the principles of the maritime law will apply. Between the owners and the crew, it appears to me, in the present case, that the true measure of justice will be, to consider her to be what the owners treated her as being, a wreck. And as the libellant faithfully performed his duty so long as his service was required, he is entitled to the benefit of the rule, that in addition to his wages the master shall provide for his expenses home. I shall allow for this purpose one month's additional wages.

## CRITICAL NOTICES.

1.—*Opinion of the supreme court of New York, delivered by justice COWEN, on the application of Alexander M Leod, to be discharged from imprisonment.* Utica Observer, July 13, 1841.

SOME of the most difficult as well as most interesting questions of international law are those which have grown out of the relations of neutral and belligerent nations.

The neutral power often furnishes an asylum, protection, munitions of war, and all the means of annoyance to one of the belligerent parties ; and, as a natural consequence, the party in conflict against whom these advantages are used is frequently compelled to come in collision with the nation professing to assume a neutral attitude. When, a few years since, a band of outlaws were engaged in an unequal contest with Great Britain, the United States occupied the position of a neutral power, and the government scrupulously endeavored to maintain that character. Still the people on the frontier where the contest existed extended not only their sympathy, but the means of war, as well as countenance and protection, to the outlaws. We do not use the term with harshness, for the individuals were violating the laws of the United States, or were rebels against Great Britain, and were clearly out of the protection of law in either country.

The individuals who were engaged in carrying on the contest with Great Britain, at length obtained possession of Navy Island, on the British side of Niagara river, and a steamer called the

Caroline was employed in aiding the various objects of those concerned in the enterprise. An expedition was soon after planned by a detachment of British troops, to destroy her, one of whom was said to have been McLeod, the individual who has been indicted for murder and arson within the jurisdiction of the state of New York. She was accordingly attacked in the dead of night whilst lying at the wharves of the American shore, after having been engaged in the service of the outlaws during the day, her crew overcome, a citizen of the United States killed in the *melée*, and the steamer itself set on fire and sent over the falls of Niagara.

The territory of the United States was therefore invaded, and the crimes of murder and arson were also committed, by an armed band from the British dominions and acting under British authority, unless the circumstances of the transaction were such as to justify the belligerent in pursuing her enemy into the territories of a neutral, and unless the British government is alone responsible. That government, however, was responsible for the aggression, because the armed party consisted of troops under the command of British officers, proceeded from the British dominions, and after consummating the object of their enterprise retired within those dominions, and until this apparent act of hostility was disavowed, the government of the United States might properly consider it as emanating from the British government.

The United States might also, at their election, institute criminal prosecutions against those individuals of the party who should fall into their power, without regarding the British government as a principal in the transaction, until she distinctly recognised and affirmed the hostile proceeding.

If the act was recognised by the British government as an act of hostility against the United States, the two countries would be in a state of war, and the individuals engaged in hostilities, if within the United States, might be treated as prisoners of war.

But if the British government, whilst assuming the responsibility of the aggression, disavowed hostility to the United States, it would then be a question for the latter government whether Great

Britain could be permitted to sustain and justify the aggression as not inconsistent with peaceful relations.

The aggression, when acknowledged by the British government, could not be justified for some purposes by the United States and condemned for others. It could not be regarded as excusable in the government and criminal in the subject. If the circumstances of the case justified the British government, the armed force was justifiable.

The only ground upon which criminal proceedings can be sustained against McLeod, if Great Britain is responsible, is that the act in which he participated was either an act of open hostility, or that it was the exercise of such a belligerent pretension and claim of right against a neutral as the United States instantly repelled, electing to treat it as a subject not of negotiation, but of immediate hostilities.

It is true, that even in that event the usages of international law would have required that McLeod and his associates, when arrested, should be treated as prisoners of war, but if they had been executed whilst war was actually existing between the two countries, no other result would have followed than measures of retaliation. It is only when relations of peace exist *de facto*, and when war may be a consequence of a violation of right, that the question is attended with consequences of great practical interest.

Immediately after the aggression, it became necessary for the government of the United States to determine whether to treat it as an act of hostility on the part of Great Britain, or to regard the aggression as founded upon a claim of right, and whilst waiving a resort to retaliatory measures, to entertain negotiations respecting the claim of right.

If the act was one of decided hostility, admitting neither of explanation nor of justification, it would have been derogatory to the character of the government to enter upon any diplomatic discussion. But after electing to negotiate, and waiving a resort to measures of forcible redress and retaliation, a state of hostilities could not be considered as existing. Neither could the United States, after presenting the outrage as a national wrong against



Great Britain, when that power recognised the act as authorized by the government, to take the ground that the aggression was a private wrong, and a crime committed by unauthorized individuals.

If McLeod ~~and~~ his companions had invaded the territory of the United States, without authority and without sanction, they would be liable to be tried for a crime, and would be subject to the punishment of common felons.

If the same acts of aggression were authorized by Great Britain, the offence of the subject ought, by the usages of nations, to be merged in the act of the sovereign. As we have already observed, the circumstances of the case justified the presumption, that the invasion was made under the authority of Great Britain.

It is true, and it is certainly very remarkable, that when the United States presented the outrage to the notice of the British government, it was neither acknowledged nor repudiated as emanating from British authority. The government of the United States might very properly have repelled this shuffling policy as evasive and unworthy of the generally lofty tone of British diplomacy. It was due to this country that Great Britain should admit or distinctly disavow the highhanded acts of her subjects. If they were felons, acting under her colors, and wearing her uniform, they ought to have been forthwith punished, or yielded up to the justice of the United States. But it is notorious that these individuals have enjoyed, in return for their services, the distinguished favor of their sovereign. Although not directly acknowledged, the enterprise has been justified as one which British subjects might lawfully undertake. We cannot entertain a doubt, that Great Britain had made herself responsible for the act of McLeod long before his arrest, as fully as if she had distinctly avowed it. As well might she avoid responsibility if her navy had destroyed every American ship on the ocean, when its officers and men had received on their return to port rewards and promotion. All the circumstances showed that the British government all along sanctioned the outrage. A reasonable time had elapsed, years even had rolled by, and notwithstanding the circumstances indicating

approval, the representations of the government of the United States were disregarded. The neglect on the part of the government of the United States to follow up the subject resulted from the delay and evasions of the British ministry, and from a natural reluctance to precipitate war, while the British government affected an attitude of irresponsibility. It is certain that under the circumstances of the case, the right to redress was neither waived nor abandoned, and the arrest of a British subject, who was one of the armed party, at length made it necessary for Great Britain to assume the full responsibility.

It has been gravely argued, that in consequence of the neglect of Great Britain to assume the act, the arrest of the individual enabled the United States to treat the whole aggression, even after the recognition of Great Britain, as the unauthorized crime of isolated individuals.

Those who employ such an argument seem to forget, that the great point to be sustained by the United States is the immunity of their soil, and that the principal question is one of national honor. We cannot say that this is simply the crime of an individual. Great Britain has taken a very different stand, which has precluded us from that position. She assumes the aggression, avows it as founded upon principles of national law, hereafter to be acted upon, and declares that the act of her subject was her own act. The great point, therefore, with which negotiations commenced, still continues and has been presented and strongly enforced by the present secretary of state, while the other question, the personal liability of McLeod and his associates, is drawn after it as an incident.

The negotiations commenced by a waiver of individual liability, and a resort to the sovereign as *prima facie* liable, by a waiver of hostilities, and with a claim of indemnity from Great Britain. Those negotiations continue. Though they have been embarrassed by delay, their character has never changed, and the inconsistency of proceeding criminally against the agent, whilst negotiating with the principal, continues as striking as in the

commencement of difficulties. This inconsistency results from the very course taken by the United States. They have never regarded the burning of the *Caroline* as such an aggression as placed the two countries in a hostile attitude. The government has never in any stage of the discussion acquiesced in releasing Great Britain, with the purpose of holding her subject to responsibility.

It is not denied, that the United States might have immediately retaliated, for the hostile act of Great Britain, upon McLeod and all the other individuals concerned, nor that they might before negotiations commenced have proceeded criminally against those individuals, but only that such proceedings could have been pursued concurrently with negotiations.

If, after the arrest of McLeod, negotiations had been broken off, the case would have been somewhat varied, but although the British government assumed the responsibility of the act, negotiations were continued on the part of the United States, whilst at the same time the indictment was pending.

If the British ministry had not evaded the question of responsibility, McLeod would never have been arrested, because the United States at all times sought indemnity from England, and not from her subject. The assumption of the act by England changed the character of this arrest. Henceforward, in the opinion of the government of the United States, it became impossible to detain McLeod, and at the same time hold England to her responsibilities.

The secretary of state therefore distinctly declared to Mr. Fox that McLeod *ought to be* released, but at the same time announced the firm determination of his government to exact redress from England. Mr. Webster did not content himself with admitting the claim of Mr. Fox for McLeod's liberation, and rest upon a demand of satisfaction from his government, but anticipating that the English government would attempt to vindicate itself by the plea of necessity, stated the very predicaments within which it would be necessary for that nation to bring itself to sustain that justification.

It is impossible to deny that there are many cases, in which an aggression upon neutral territory would be justifiable, where two conterminous powers are separated by an imaginary line. Suppose that a British fleet, anchored in Niagara river, were attacked by fireships from the American side. Can there be any doubt of the right to fire across the "thread of the river." Would it be claimed that the incendiaries might pursue their designs with perfect impunity, if protected by an imaginary line?

But these rights of defence and aggression are evanescent. They cannot be deferred, for they vanish with the hour. They exist in hot pursuit, and disappear entirely when the blood has had time to cool. We are bound to acknowledge, that if the *Caroline* had been engaged in conflict with the armed force which destroyed her, and had been pursued into American waters, the aggression would have been entirely justifiable. Such, however, was not the fact. If there had been any conflict during the day, there had been time for the blood to cool. There was no hot pursuit, and the steamer was quietly moored in the night season, on the American shore.

It is not now assumed in these negotiations, that the act of destroying the *Caroline* and the military excursion were of course wrongful, but it is distinctly admitted, that if the British government can bring itself within certain conditions stated, then its acts were justifiable. Now, whilst these negotiations are pending, and whilst the facts of the case and the principles which govern them are in controversy, we think it most absurd to proceed in a criminal indictment against McLeod, the agent. It is admitted by the government, that though he may have been guilty of the offence stated in the indictment, still in a case supposed he is not guilty of any crime, because the act of his government was justifiable. Will it be said that the question of his guilt depends upon the ability of the British government to bring itself within the predicaments stated? Must McLeod allege in his defence all the reasons of state which might have influenced and justified the government of Great Britain? Does his guilt or innocence depend upon the issue of negotiations? Will it be said that he may be detained

provisionally until the event of negotiations is known? But his very detention would be regarded as an act of retaliation, and might possibly be considered as such an act of hostility as would put an end to negotiations.

The true rule seems to be, that the injured nation has a right to elect between negotiation and acts of retaliatory hostility, between taking the means of redress into her own hands, and yielding up the very instruments of wrong to the sovereign of whom indemnity and satisfaction is claimed.

The very time of the act of aggression is the moment when the nation injured must decide upon the remedy. It may then punish the individual aggressors in the heat of strife. It may repel, and assail the country of the aggressor in turn. But if, when the heat of battle is over, negotiations and conferences have followed, then the wrong inflicted in the individual instance furnishes one only in the list of wrongs which may remain to be redressed by general war. The object of the war would be not to reach the individual aggressor, not to wreak vengeance upon the parties to the injury, but to render the sovereign responsible, and to seek from the head of the state, as the consequence of hostilities, full and adequate indemnity as well as security for the future.

They who maintain that the secretary of state erred in conceding that McLeod ought not to be tried, if the responsibility for his acts was assumed by Great Britain, suppose that the aggressors might be punished for a crime, and yet peace be maintained with that government under whose authority the alleged crime was committed. The error is palpable. That government would be base and abject, which would permit those who had acted under its authority, in a measure of *quasi* hostility, or in the assertion of a claim of belligerent right against a foreign state, to be punished for that obedience, without exerting her utmost force for their protection. When the act of the subject was acknowledged and authorized by the sovereign, peace with the state would be inconsistent with criminal proceedings against the subject. Those proceedings would constitute open war against the sovereign, and the war which was directed against individuals, would of necessity

become general. It would be impossible for the British government to decline a war thus forced upon it. Great Britain would be required, by every principle of justice, to protect her subjects, whose safety was compromised only by obedience to the commands of the sovereign. The propriety of the enterprise, its consistency with relations of peace and the obligations of treaties, its lawfulness, and its necessity in such an emergency, can never be permitted to come into discussion. Proceedings against the individuals engaged in the expedition would precipitate a conclusion, and bar all negotiation. The only inquiry on the part of the British government would be, whether the parties implicated had acted under her authority; and there could be no question entertained as to the character of the enterprise, because it was of a public nature, and the government had impliedly guarantied to the individuals engaged in it immunity and protection.

If, however, Great Britain should suffer the outrage to pass unnoticed, still an occasion would be furnished for a refusal on her part, further to entertain negotiations respecting other subjects of controversy, and the consideration of the claim of the United States, to redress and satisfaction for the invasion of their territory, would be precluded. This would be a certain consequence of the attempt to subject the agents of a foreign government to punishment for their acts in a public character, without regard to the claim of right presented on the part of the foreign state.

It could not be pretended that the injured government was entitled to double satisfaction. In the case under consideration, the United States demand redress of Great Britain for the invasion of their territory. Whilst this demand is pending, the subject of the latter power, who was employed as the instrument of the aggression, comes within their reach, is arrested, and it is proposed to subject him to punishment in his own person, as if the national wrong was his own private offence. The consequence would be, that Great Britain would refuse entirely to atone for the public wrong, or even to consider it. She would take the ground and with great justice, that we had sought and found satisfaction from her subject, and that, therefore, we were not entitled to redress

from the sovereign, and her answer would be to the offer to negotiate in regard to the violation of territory, that this country had already prejudged the question, and that it was therefore incapable of being made the subject of negotiation.

But when the government of the United States disclaimed the intention of punishing the agents of the government for the offence of the sovereign, and renewed the demand for explanation and indemnity on Great Britain, holding the nation alone responsible, an entirely different state of things was established. As the wrong of the British government and not of her subaltern, it was worthy of the vengeance of the United States — *Dignus vindice nodus*. And, now, if the government of Great Britain finds that the expedition, set on foot against a power at peace with her by subordinate colonial authorities, was conceived in hot blood and executed with rash weapons, she may without dishonor make the amends worthy of a great nation and a just people.

It would have been impossible for her to abandon those who had acted under her commands, or to suffer any question in regard to the justice of the expedition, whilst the United States consented to the detention of McLeod. But after protection was secured to the individuals composing the expedition (and there cannot be a doubt of their ultimate protection by the United States), the justice of the enterprise might be considered on the part of the government, and any concession which the British government may now make, any indemnification which the circumstances of the case may require, may be yielded without dishonor, although it could not without disgrace have failed to secure the protection of those subjects, who acted under her authority even in the execution of an enterprise which was acknowledged to be unjust.

This is the great advantage of the new turn given to affairs, by the government of the United States. We have not merely found a responsible principal, capable of atoning for past injuries and of securing the country against future aggressions, but war is not now unavoidable, negotiation is not precluded, the government is not debarred, as at one time it would seem to have been, by a false position, from appealing to those principles of right on the true

point in controversy, which no country can at the present day disregard, without forfeiting its standing among the nations of the earth.

If the United States had persisted in the claim of right to punish McLeod on a criminal indictment, such criminal proceedings would *per se* have constituted an act of hostility against Great Britain; so that the negotiations which were in progress on the boundary question, and many other subjects which have been long in dispute between the two governments, would at once have been terminated, and the country engaged in war on a collateral issue.

We now proceed to consider the question in other relations. The United States have yielded to the demand of Great Britain for the discharge of her subject, and have taken all proper measures to procure his release by the state of New York.

McLeod, failing however to obtain his liberty by any of the modes resorted to on his behalf, sued out a writ of *habeas corpus* returnable to the supreme court of the state. That court has decided that he must be remanded, and that the trial on the indictment must proceed.

The result at which the court arrived seems to us unavoidable, on the *ex parte* application, for a reason urged with great ability by the attorney general of the state, that the court could not know that the accused had not passed beyond the line of authority assumed by Great Britain; but from the opinion of Mr. Justice Cowen, which covers the whole ground in question, we must respectfully dissent.

Mr. Justice Cowen, in his opinion, says, "England then could legally impart no protection to her subjects concerned in the destruction of the *Caroline*, either as a party to any war, to any act of public jurisdiction exercised by way of defence, or sending her servants into a territory at peace. That her act was one of mere arbitrary usurpation, was not denied on the argument, nor has this, that I am aware, been denied by any one except England herself. I should not therefore have examined the nature of the transaction to any considerable extent, had it not been necessary to see whether it was of a character belonging to the law of war



or peace. I am entirely satisfied it belongs to the latter ; that there is nothing in the case, except a body of men without color of authority, bearing muskets, and doing the deed of arson and death ; that it is impossible even for diplomatic ingenuity to make it a case of legitimate war, or that it can plausibly claim to come within any law of war, public, private, or mixed." Now, could the learned judge fail to discern, that if this ground is taken and persisted in by the state of New York, she affirms her entire independence as a distinct sovereignty, and withdraws the whole subject from the decision of the federal government ? And yet Great Britain could not be permitted to entertain any negotiations with the state of New York, though a sovereign state.

It is for the federal government and not for the state of New York or her courts of justice, to determine whether England is at war with this country, or could " impart any protection to her subjects concerned in the destruction of the *Caroline*."

We take the liberty to suggest, for the consideration of the learned judge, the doctrine of lord Ellenborough, 15 East's Rep. 81, adopted by him in another part of his opinion. " I agree," said his lordship, " with the master of the rolls, in the case of the *Pelican*, that it belongs to the government of the country to determine in what relation of peace or war any other country stands towards it ; and that it would be unsafe for courts of justice to take upon them without that authority, to decide upon those relations. But when the crown has decided upon the relations of peace or war in which another country stands to this, there is an end of the question." If the states of this union have parted with any branch of their sovereignty, it is that with which they have so fully invested the federal government in the conduct of foreign relations. It belongs to the federal government to determine in what relations of peace or war any other country stands towards it, and it would be unsafe for the courts of justice of the several states to take upon them, without that authority, to decide upon those relations. We presume it would not be contended, that if the United States should by a solemn treaty recognise the right which Great Britain claimed to make the incursion, or if they

should engage to deliver up McLeod, or to do any other lawful act in the premises, that the state of New York and her courts of law were not bound as by a law of the land ; but the action of the executive of the United States is not conclusive merely, in the treaty-making powers of the general government. The rights of sovereign states and their relations with each other do not depend upon written treaties alone. The executive of the United States is bound not only to execute treaties with foreign powers, but to fulfil those duties which grow out of common right. Those duties were not created by a compact, which, under the peculiar constitution of the United States, required the concurrent action of the executive and one branch of the legislature.

The executive is bound to decide upon the extent of such duties, and to fulfil them in the same manner as those which result from treaties. In the case of the *Caroline*, Great Britain claimed certain rights as a power carrying on war with individual outlaws. Among others, she claimed the right of following her assailants beyond the frontier of the United States. She rests her plea upon the ground of necessity, and cites from the American code of diplomacy as a stringent authority, the case where general Jackson violated the Spanish territories, as one that was fully sustained and justified by the United States.

Now, whether our government were wise in consenting to negotiate with Great Britain at all, after the aggression, is quite immaterial to the present point. Having entered into negotiations, all hostile proceedings on the part of the state of New York are precluded. The executive may decide, and it is his duty to decide, upon the claims of right made by Great Britain, and his decision is final, and a recognition of the existing law of the land, which is as binding upon courts and upon the several states as a treaty could be. It is binding, not simply because it is a construction of law, but because it imparts a right to the foreign power. If, therefore, when Mr. Fox made a demand on the United States for the discharge of McLeod, the president had reviewed the whole case of the burning of the *Caroline*, and decided that the incursion was lawful for reasons of necessity, that decision would have been con-

clusive on this nation. A consequence of that decision must have been the discharge of McLeod. If instructions had been sent to the American minister in London to withdraw the demand for redress, and to concede the justice of the enterprise, we presume that McLeod would at once have been liberated by the authorities of New York. If our conclusion is just on this subject, and if it was competent to the executive of the United States to decide the whole question as one of admitted right, *a fortiori*, the executive might decide, and his decision would be an imperative construction of law, that McLeod was not personally responsible for executing the commands of his sovereign.

But the views of Mr. Justice Cowen are entirely different. We trust they are peculiar to himself, and they are certainly gratuitous, for the exigencies of the case did not demand an expression of them. He does not admit, that if a government negotiates respecting any transaction, and "is led" to the approval of it, that the nation, thus giving its sanction to the act, is precluded from treating the transaction as a crime.

"Upon the principle contended for," says the learned judge "every accusation which has been drawn in question by the executive power of two nations, can be adjusted by negotiation or war only. The individual accused must go free, no matter to what extent his case may have been misapprehended by either power. No matter how criminal he may have been, if his country, though acting on false representations of the case, may have been led to approve of the transaction, and negotiate concerning it, the demands of criminal justice are at an end." "Under circumstances, the executive power might, in the exercise of its discretion, be bound to disregard a venial offence as no breach of treaty, which the judiciary would be obliged to punish as a breach of international law."

He expresses the opinion, also, that the executive of the United States had no power to inquire whether McLeod had personally violated the criminal laws of the state of New York, that it had charge of the question in its national aspects only, and that diplomatic considerations may be entirely wide, either of the fact or of the law, as it stands between the state and the accused.

The argument of the learned judge is founded upon the complex view, taken by him, of the relations of the state and general governments to each other. He seems to view the state government as a third party in those foreign relations of which he treats. But the two jurisdictions can properly be viewed only as identical. The general government, so far as its jurisdiction is called into action, supersedes entirely, and controls the state government. It also represents the state and acts on its behalf. Now it is a mistaken idea, that the government, in its diplomatic functions, can be distinguished from the government in its municipal functions, or in its administration of criminal law. Viewing then the state and the federal government as one, any compact, any concession or arrangement which it may make with a foreign power, respecting a transaction which is *prima facie* of a criminal nature, is entirely conclusive respecting the character of that transaction. If the state agrees, or is "led to admit" that the transaction is lawful in respect to diplomatic considerations, the state being a party to all criminal prosecutions is estopped to treat the transaction as unlawful. If the state agrees to regard the offence as no crime on the part of the foreign power which is the principal, shall it constitute a crime on the part of the subject who is the agent?

If the admission on the part of the injured nation, that an aggression is lawful, is not attended as a consequence by the indemnity of the individuals concerned, because the crime against the state remains, then a treaty which declared that the aggression was the exercise of a lawful belligerent right, and provided expressly for the immunity of the armed force by which it was effected, might, for the same reason, be treated as a nullity by a court whose duty it is to give full effect to the treaty as the law of the land. The whole doctrine is monstrous and full of absurdities.

The very reverse of the rule acted upon by the supreme court of New York is the true rule on this subject. The jury and the court are only competent to try the naked question, whether those facts existed which constituted in point of law the crime alleged in the indictment. They are not competent to decide upon questions of diplomacy pending between the government of the United

States and a foreign power, because their decision cannot be a rule of action for the two governments. And it is quite possible that the discussion might end in a result entirely different from the decision of the court. The facts of the case as presented by the foreign power cannot be known. The case may be doubtful in principle, and the degree of necessity urged on behalf of the belligerent may be so uncertain as to be incapable of settlement but by treaty. Then the treaty, with all its conventional rules and principles, would be the rule of decision for the court, and not any preconceived doctrines or notions of international law. It is a rule too that courts are not to question the principles established, as existing in the relations of their own government with foreign powers.

It would be impossible, therefore, for the court to weigh any of those diplomatic considerations which might serve to show the guilt or innocence of McLeod.

We, however, entertain the opinion that as the question is no longer pending in discussion, but the right of McLeod to a discharge has been established by the decision of the executive of the United States, a jury would be justified in a verdict of acquittal.

We do not differ from the learned judge, whose opinion we have considered, in the conclusion at which he arrived, on the imperfect disclosures upon an *ex parte* application. Our objections are to that strain of reasoning in which he passes beyond the exigencies of the case, and decides, in effect, upon the duties of the executive.

We now come to the real, practical difficulty in the case of McLeod. The executive of the United States has responded with great clearness to the demand of the British government that he ought to be discharged. The governor of the state has refused, however, to perform that duty, and unless the case can be removed, in some of its stages, into the tribunals of the federal government, so that a *nolle prosequi* can be entered by the requisition of the president, an insuperable bar appears to be interposed to the execution of our obligations to the government of Great Britain.

We are disposed to sustain the doctrine of the sovereignty of the states, so far as may be consistent with the constitution of the United States, but as all foreign relations are entrusted to the general government, any attempt on the part of the executive of the states, to interfere with or embarrass those relations, is a gross violation of duty as well to the people of the states as to the federal government.

The acts of the governor of the state of New York cannot be properly regarded as emanating from the state sovereignty. He has sworn to maintain the constitution of the United States as well as of the state, and his imperative duty was to yield to the action of the federal government, within its appropriate functions.

The United States find themselves withheld from the fulfilment of their duties to a foreign power, by the refusal or neglect of a state functionary to perform his constitutional duties, and the question arises, whether the government has fully executed its obligations to that power, in using every means within its reach to procure the discharge of her subject, and we entertain the belief that those obligations are fulfilled.

There are many supposable cases, where it would be impossible for an independent and sovereign state, because of internal difficulties, to protect the subjects of a foreign dominion. Insurrection, rebellion, the occupation of a province by a rival claimant of the throne, as happened in England during the wars of the houses of York and Lancaster, may render actual protection impossible, and yet there may be no refusal of justice which would render a resort to war inevitable.

Whilst our diplomatic relations with Great Britain are conducted by that statesman, whose duty it has been to encounter the difficulties which attend this subject, we do not apprehend that the reputation of the country can be tarnished, or her justice brought in question.

He might, if he could have stooped to that low ambition, have won the plaudits of the unthinking by a different and less magnanimous line of diplomacy. But he saw the truth with clearness, and his nature was too noble to deny or conceal it. *Alii multitu-*

*divinis iudicio feruntur, quæque majori parti pulcherrima videntur, ea maxime exoptant: nonnulli tamen, sive felicitate quadam, sive bonitate naturæ, rectam secuti sunt viam.*

S. F. D.

2. — *Argument of Robert J. Walker, Esq., before the Supreme Court of the United States, on the Mississippi Slave Question, at January Term, 1841, involving the Power of Congress and of the states to prohibit the interstate Slave Trade.* Philadelphia: John C. Clark, 1841.

The only real question, presented by the case above alluded to, was, whether a clause in the constitution of the state of Mississippi, declaring that the introduction of slaves therein as merchandise should be prohibited after a specified time, was operative by itself and without any legislative act; and, this question, we think, was rightly decided in the negative. Another question was also raised, namely, whether a law of the state, carrying out the constitutional provision, was void or not, as interfering with the powers of congress to regulate commerce. On this question, Justices Story, Thompson, Wayne, and M'Kinley, expressed their opinion in the negative, and Baldwin in the affirmative. Mr. Walker's argument in the affirmative of the first question and the negative of the other, though exceedingly full and able, does not satisfy us that the decision was wrong.

3. — *A Catalogue of the Law Library of Harvard University in Cambridge, Massachusetts.* Second edition. Cambridge: Folsom, Wells, and Thurston. 1841.

The first edition of this catalogue was prepared and published in 1834, by our late co-editor, Mr. Sumner, then librarian of the law library attached to Harvard University. The second, which has been made necessary by the very great additions to the library since received, appears under the auspices of Mr. Woodward, the present librarian. These additions, consisting in part of donations, and in part of purchases, have doubled the number of volumes contained in the first catalogue: thus affording gratifying

evidence of the interest with which the institution is regarded; as well as of the prosperous condition of its finances.

Having run over the titles of the works in this catalogue, with considerable attention, we are prepared to admit, that the law library of Harvard University is one of very great value; that in some few branches, it is far from incomplete; and that in the departments of English and American law, it may be regarded as nearly if not quite perfect; but we are wholly unable to agree with the librarian in his (as it seems to us) most extravagant estimate of its value and completeness, in any other branches than those of English and American law. Some of this gentleman's assertions are so extraordinary, that we cannot refrain from noticing them.

"This library," says Mr. Woodward, is now "among the first in this country, or *perhaps in any country*, as a collection of general and municipal jurisprudence." This may be true, so far as law libraries in the United States are concerned; but if Mr. Woodward imagines, that the law library of Cambridge stands among the first (even with a *perhaps*) "in any country," in the departments of general and municipal jurisprudence, we cannot help thinking, that by its proximity to himself, his field of vision has been sadly obscured if not altogether covered up. We shall not undertake to enumerate the law libraries of Europe, which are richer than that of Cambridge in works of general jurisprudence. If it were necessary to do so, in order to demonstrate the extravagance of Mr. Woodward's remark, we should begin with the Advocate's Library in Edinburgh, which contains eighty thousand volumes, of which ten thousand are works of a strictly juridical character. This library we should call "among the first in any country," and, unless we judge by something besides numbers, the law library at Cambridge, with its two or three thousand volumes of works on general jurisprudence, can scarcely be put into the same class.

Another statement of Mr. Woodward's is, that the additions since 1834 "nearly complete the collection of European law, both British and continental, from the earliest times down to the



eighteenth century." From the fact, that very many of the continental works, mentioned in the catalogue, belong to the eighteenth and nineteenth centuries, we suppose that the expression "down to the eighteenth century," is intended to include that century. Whether so intended or not, however, the assertion is evidently dictated more by a zeal for the glory of the law library of Harvard University, than by a knowledge of legal bibliography. What the number of those works, which are supposed to nearly complete the collection of European continental law, may be, we are not informed; but if all the works in the library were of this description, they would not altogether amount to more than one third of the works on jurisprudence, which have been published in Germany alone, since the middle of the last century. We have before us, at this moment, a catalogue of works on jurisprudence printed in Germany between 1750 and 1839, which makes a very closely printed octavo volume of 524 pages. Allowing the Cambridge catalogue to contain as many works to a page as the German one, and this is considerably to the advantage of the former, the German will be found to have in it three and a half times as many titles as the other; and, supposing one half of them to have been published in the eighteenth century, the number of such will greatly exceed the whole number of books in the law library at Cambridge. But, during all this time, other countries have not been idle; France, Italy, Holland, Belgium, have also published juridical works within the same period; and, taking all these together, how is it possible to suppose, that the few hundred volumes of European continental law, to be found in the law library of Harvard University, "nearly complete the collection from the earliest times down to the eighteenth century"?

The next assertion of Mr. Woodward's, that strikes us (at least by implication) as somewhat extraordinary, is, that "the collection of the codes of continental Europe [in the Cambridge law library] is probably more ample than that of any other [library] in this country." The fact may be so. No other library in this country, perhaps, contains a greater number. But the language seems to imply, that the library is peculiarly rich in this department,

whereas, in truth, it is singularly deficient, unless, by "modern codes of continental Europe," is meant the laws of modern European states. In three of the states of modern continental Europe, certainly, the laws have been codified in general codes, namely, France, Austria, and Prussia; some states have commercial codes, as Spain and Holland; others have codes of procedure; and several have criminal codes. Of all these, besides the French translations of codes in Mr. Foucher's collection, we find several of the French codes, the commercial code of Spain (also in Mr. Foucher's collection), the first part of the code of the two Sicilies, the second and fourth parts of the same (in Mr. Foucher's collection). Of the Prussian code, we find the original project of Frederic the great (code Frederic), but not the existing *Landrecht*; of the Austrian codes, we find the translation of the penal code in Foucher, but not the civil code, which is in the third (missing) volume of that collection; while, of the great number of criminal codes and plans of codes, adopted or considered by individual continental powers, within the last fifty years, we find nothing except a commentary on the criminal laws of Bavaria. If there are any others, they have escaped our notice, in a pretty careful examination.

The last statement of Mr. Woodward's, that we shall notice, is the most extraordinary of all. He says, that "importations of the most valuable of the latest British and Continental law books and legal reviews are regularly made." We have not examined the catalogue, in reference to the British law books and reviews, which are imported as the most valuable; but as we find little or nothing, answering to the *latest* continental law books and reviews, we conclude either that Mr. Woodward is ignorant of the great numbers of both descriptions of works, which are continually published in France and Germany, (to say nothing of other countries,) or that he, or whoever superintends the importations for the library, does not consider them of any value. It may be, that these works are, or would be, of no value to the law library at Cambridge; though it would be strange, if, out of so large a number, there should not be some worthy of a place there. We have

before us, a catalogue of the works published in Germany, in the last half of the year 1840, and for sale by a single house in Hamburg, in which the head of *jurisprudence* contains eighty-two titles of new publications; and this number is not above the average. A similar activity prevails in France. We could mention the titles of some of the "most valuable" of these continental law books, if it were desirable to go into the matter at length, and we cannot refrain from indicating one. Mr. von Savigny, of Berlin, one of the most learned and able as well as celebrated of modern jurists, is now publishing his great work on the Roman law (*System des heutigen Römischen Rechts*) in which are embodied all the results of the critical studies and discoveries of modern times in that department. This work is also published simultaneously in a French translation at Paris. Here is a work, which, we venture to say, is received with as much *empressement* throughout continental Europe, as a new work by Story or Kent would be in this country, but we do not find it in Mr. Woodward's catalogue among the "most valuable" of the continental law books.

Nearly all the *latest* modern works of continental jurisprudence, which we find indicated in this catalogue, are written, we believe, in the French language. Are there no "valuable" works of jurisprudence written in German? Mr. Woodward's idea of the "most valuable" continental "legal reviews," is equally narrow. Under the head of *Legal Reviews, Journals, &c.*, he gives the titles of two continental works, having the form of periodicals, both of which are in French, and both, as appears by their titles in the catalogue, long since brought to a close; so that it seems the term "most valuable," in reference to "legal reviews," means precisely nothing. In Paris alone, at this moment, if we are not greatly mistaken, there are two daily law journals, and not less than twenty which are published monthly. In Germany, the number is undoubtedly much greater, while Holland and Italy have, at least, one each, if not more. We, ourselves, receive regularly three German and two French law journals, which we should characterize as among the "most valuable" of the continental legal reviews, but we do not perceive the titles of any of them in this catalogue.

We have felt it our duty thus briefly to allude to the extraordinary statements contained in Mr. Woodward's advertisement, each of which might well furnish matter for a long article; and, in conclusion, we have only to say, that we know not which most to admire, the singular presumption of that gentleman in putting forth such absurdities, or the unaccountable negligence of the law faculty, by whose direction the catalogue was prepared, in allowing them to appear.

The publication of this catalogue enables us to judge, in some sort, of those means of obtaining a law education, in the law school at Cambridge, which are independent of the personal labors of the distinguished professors of that institution. In the departments of English and American law, little perhaps is wanting; but, in some departments of general jurisprudence, much is to be desired. In the department of Roman law, for example, we find none of the modern works, with the exception of the unfinished English translation of Savigny's history, by Cathcart, and a French translation of the same work, and the newly discovered fragments of Gaius; and, yet, in no department of jurisprudence, has the present century produced more or more valuable works. We venture to say, that, with the exception of the *corpus juris* itself, there is hardly a single book in the law library of Harvard College, which a modern professor of Roman law would think of putting into the hands of his pupils. We desire not to be misunderstood. The works on Roman law, in this library, are undoubtedly valuable, and well deserve a place there; and the same may be said, and for much the same reason, of Bracton, Glanvil, and the year books; but the former are as little suited to the modern student of the Roman law, as are the latter to the student of the common law. In reference to the propriety, not to say necessity, of an acquaintance with modern works on the Roman law, in preference to the ancient, a point of legal criticism occurs to us, which, as it is both curious in itself, and will also serve as an illustration, we shall take this occasion to mention. At the time Pothier published his treatises on French law, the received doctrine of the commentators on the Roman law recognised three degrees of fault or neglect, and three corresponding degrees of diligence, in

contracts coming under the denomination of what we call bailments; and Pothier, accordingly, composed all his treatises on contracts, in conformity with this received doctrine. His works fell into the hands of sir William Jones, who borrowed from him the doctrine of the three degrees, and inserted it in his *Essay on Bailments*, with not a little parade, as the result of profound and original investigation, and as intimately founded in the nature of things. From sir William Jones, the doctrine of the three degrees has come down to our times, in the regular stream of English elementary books and judicial decisions, without being controverted or questioned, so far as we know, by any body; and is now as well settled (theoretically, at least,) as any doctrine of the English common law. On the continent of Europe, however, since Pothier's time, this same doctrine has been examined by the light of a more profound and philosophical criticism, than then existed, and has for many years been wholly abandoned, as a doctrine of the Roman law; so that no respectable professor would probably be found at the present day to teach it as such. What information on this subject, can the student of Roman law obtain from the law library of Harvard College? In modern works on the Roman law, the library of the Boston Atheneum is infinitely richer, though that, we believe, has received no accessions in this department, within the last fifteen years. In criminal law, and prison discipline, the works on which, produced in continental Europe within the present century, would, of themselves, constitute a large collection, this library is almost entirely deficient; and, of modern works of public law, and the philosophy of law, we find few or no traces. Of all the countries of Europe, or, indeed of the world, Germany now produces the greatest number of works on jurisprudence and its kindred topics, which are almost all of them written in German; and, yet, astonishing as it may seem, the law library of Harvard University,—among the first, “perhaps in any country as a collection of general and municipal jurisprudence,”—containing “a nearly complete collection” of European continental law, “from the earliest times down to the eighteenth century,”—and furnished with the “most valuable” among the latest “continental law books and legal reviews,”—as Mr. Woodward would have

us believe, — does not, so far as we have been able to discover from the catalogue before us, contain a single work in the German language !

In what we have said, it has been far, very far, from our intention, to undervalue the law library of Harvard University, or to find any fault with the distinguished gentlemen, who have charge of the school with which it is connected, for the deficiencies we have pointed out. We desire to bear our testimony to its great excellence ; and, while doing so, to suggest beforehand to the editor of the next catalogue, that it is quite too valuable to need any undeserved or vainglorious commendation.

4. — *Reports of Cases argued and determined in the Supreme Court of Ohio in Bank.* By P. B. WILCOX, Attorney at Law. Volume I. Columbus : Wright and Legg, 1841.

The volume before us appears to be the commencement of a new series of the reports of the supreme court of Ohio, reported upon a new plan, and by a new reporter. All we are told of the matter, however, is contained in the following pithy memorandum, which we admire for its brevity, — a rare quality indeed in books of reports :

“In these reports, the statement of facts and the opinion are drawn up for the press by the judge who gives the decision of the court. The cases are argued on paper. The arguments are either printed entire, — abstracted by the reporter, — or omitted, — as directed by the court. Judge Hitchcock, in his cases, makes his own abstract of the arguments.”

We are inclined to think well of this mode of reporting from the specimen here presented. It leaves the reporter but little more to do, than to act as an editor, in superintending the press, and to make the introductory abstracts and index ; — all which seems well done by Mr. Wilcox. Besides performing the ordinary duties of a reporter, Mr. Wilcox has inserted several learned and valuable notes. We noticed one case, in which the introductory note stated only one of the two points argued and decided in the case, namely, *Vairin v. Can. Ins. Co.*, p. 223. In this case, two points were made, relating to the proof of an insurable interest in the plaintiff, and the competency of the pilot of a steamboat as a witness. The latter only is stated.

## INTELLIGENCE AND MISCELLANY.

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*Hilliard's Law of Sales.* In a short notice of this work, in our last number, we took occasion to allude to its title of *Treatise*, as implying an assumption of character for it, to which it was not entitled. Our criticism, as we are informed, has been so far misconceived by the author, as to be supposed to intend a censure of him, for giving his work a higher title than it deserved; and as equivalent to saying, that because we did not think the work a treatise, therefore, we considered it to be wholly destitute of merit. As we would not willingly be the means of doing injustice by our criticisms, least of all, to a deserving and industrious fellow laborer in the literature of the law, we beg to assure Mr. Hilliard, that we had no intention whatever to disparage his *Law of Sales*, which we regard as a very valuable and useful compilation; and we certainly did not mean to charge him with selecting the title of *Treatise*, for the purpose of giving his work the appearance of something higher than a compilation or digest.

*American Trials.* We take great pleasure in announcing, that our friend and cotemporary, P. W. Chandler, Esq., editor of the *Law Reporter*, has commenced the preparation of a work, with the above title, the first volume of which will very shortly appear. Having been favored with a perusal of the sheets as far as printed, we have no hesitation in saying, that these trials will be read with very great interest and satisfaction by all classes of readers.

*To our Readers.* It will be perceived, that, commencing with the present number, S. F. Dixon, Esq. of New York, has become an associate editor of this Journal. No change in the character of the work is contemplated. It will be conducted as heretofore.

## QUARTERLY LIST OF NEW PUBLICATIONS.

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### ENGLAND.

A Digested Index to the Common Law Reports, relating to Conveyancing and Bankruptcy, commencing with the reign of Elizabeth, in 1558, to the present time. By *Edward Chitty* and *Francis Forster*, Barristers at Law.

Cases chiefly relating to the Criminal and Presentment Law, reserved for consideration, and decided by the Twelve Judges of Ireland, from May, 1822, to November, 1840. By *Robert Jebb*, Esq., Barrister at Law.

A Treatise on the Law relating to Infants. By *William M'Pherson*, of the Inner Temple, Esq., Barrister at Law. Part I. Guardianship.

Plain Instructions to Executors and Administrators, showing their Duties and Responsibilities; with Abstracts of the Legacy Acts, and a Fictitious Will, comprising every Description of Legacy, with the Forms, filled up, for every Bequest. By *John H. Brady*, late of the Legacy Duty Office, Somerset House. The ninth edition.

A Treatise on Wills. By *T. Jarman*, Esq., of the Middle Temple, Barrister at Law. In two volumes. Vol. I.

An Analysis of the First Principles or Elementary Rules of Pleading contained in Stephen, Archbold, and Chitty; designed for the use of Students in Law and Articled Clerks. By *Richard Garde*, Esq., A. M., of the Middle Temple, Barrister at Law. Second edition.

A Treatise on the Rights and Duties of Merchant Seamen, according to the General Maritime Law and the Statutes of the United States. By *George Ticknor Curtis*, of the Boston Bar. In one volume, 8vo.

The Common Law and Equity Digest, carefully compiled, and so arranged as to form a Practical Book of Reference in Chancery and Courts below. By *George Farren*, jun., Esq., Chancery Barrister. In 8vo.



## UNITED STATES.

Reports of Cases argued and determined in the Supreme Judicial Court of Massachusetts. By *Octavius Pickering*. Vol. XIX. Boston: Charles C. Little and James Brown.

[This completes the series of Mr. Pickering's Reports, down to and including the twenty-second volume. We understand he has a twenty-third volume in press, which will complete the series of the Massachusetts Reports, down to the first of Metcalf.]

Reports of Cases argued and determined in the Supreme Judicial Court of Massachusetts. By *Theron Metcalf*. Vol. I. Boston: Charles C. Little and James Brown.

[For an opinion of Mr. Metcalf's first volume, see a notice of the first part of it in the last October number.]

Reports of Cases argued and determined in the Supreme Court of Judicature, and in the Court for the Correction of Errors of the state of New York. By *John L. Wendell*. Vol. XXIII.

The American Chancery Digest; being a digested Index of all the Reported Decisions in Equity in the United States Courts, and in the courts of the several states. By *Jacob D. Wheeler*, Counsellor at Law. 2 vols. 8vo.

The Louisiana Law Journal, devoted to the Theory and Practice of the Law. Edited by *Gustavus Schmidt*, Counsellor at Law. Vol. I., No. I. May, 1841. Published quarterly by E. Johns and Co., Stationer's Hall, New Orleans, 1841.

[This first number of a young law periodical promises so well, that we cannot but hope the work will live to grow up.]

National Rights and State Rights. A Review of the Case of Alexander McLeod; recently determined in the Supreme Court of Judicature of the state of New York. By a Member of the Massachusetts Bar. Reprinted from the Law Reporter. Boston: Bradbury and Soden, 1841.

[We are glad to see this very able article, understood to be by *John Pickering, Esq.*, reprinted for general circulation.]

# AMERICAN JURIST.

NO. LII.

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JANUARY, 1842.

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## ART. I. — LIFE OF LORD CHANCELLOR BATHURST.

[On the dismissal of lord Camden from the office of chancellor, in the month of January, 1770, Charles Yorke, the second son of lord chancellor Hardwicke, was induced, by the allurements of power and the personal solicitation of his sovereign, to desert his party and accept the vacant office, with the title of lord keeper. This defection from his political principles brought upon him the bitter reproaches of his party and friends, and is commonly supposed to have led to his premature and melancholy death, of which the following account is given by the author of the life of lord Hardwicke, in the *Law Magazine*. "His acceptance of the great seal, in January, 1770, gave such displeasure to his brother, to lord Rockingham, and others of the party with which he was connected, that, stung with the coldness and the reproaches he had encountered in an interview with them, he no sooner arrived at his house in Ormond street, than he drank freely of some brandy which happened to be on the sideboard. The ardent spirits, combined with the strong irritation and the nervous excitement of his mind, brought on a violent paroxysm of sickness, which occasioned the rupture of a blood-vessel, and he lived but a very short time afterwards."

As lord Camden was not dismissed before the sixteenth of January, and Yorke died on the twentieth, the latter can hardly be considered as making one of the series of English chancellors; though, if he had lived, there is no doubt that his learning and talents would have secured him an honorable if not a distinguished rank among them.

On the death of Mr. Yorke, the seals were put into commission, until the month of January in the following year (1771), when they were delivered to

Mr. Justice Bathurst, with the title of lord chancellor. The following sketch of the life of the latter is abridged from the *Law Magazine*, vol. xvi. pp. 270—285.]

THE author of certain "Strictures" on the lives of the eminent lawyers of his time (published in 1790) introduces his notice of lord Bathurst in the following terms: — "We may boldly write down, that the earl of Bathurst became a great character perforce; he was nursed in a political hot-bed, and raised *per fas et nefas*. Nothing less than the same necessity introduces his lordship's name in the same page with those illustrious personages, which it is the purpose of this volume to portray." Without admitting the applicability of such unqualified depreciation as this, it cannot be denied that the personal qualities of the noble lord, either as a lawyer or a statesman, would hardly of themselves have invested him with any claim to posthumous commemoration. But the attainment of the great seal, the object of all a lawyer's hope and veneration, of itself entitles its possessor to a place among the worthies of the profession, and to a niche, though none of the most conspicuous, in our gallery of legal dignitaries.

The family of Bathurst is one of very considerable antiquity. According to Jacob, its ancestors were originally settled in the principality of Luneburg, at a place called Batters, whence they bore that name; and some of them passing into England, in the tenth century, established themselves near Battle in Sussex, and gave their residence the name of Batters' Hurst—that is, Batters' Grove—which was afterwards abridged into Bathurst. In the course of the dissensions between the houses of York and Lancaster, Lawrence Bathurst, the then representative of the family, was deprived of this property in Sussex, which was annexed by the crown to Battle Abbey. He retained, however, lands in Staplehurst, Canterbury, and elsewhere in the county of Kent, which he had acquired by his suc-

cessful industry in the woollen manufacture, to which many of the long-descended gentry of that county are indebted for their first advance to wealth and consequence. George Bathurst, the third in descent from this Lawrence, was the father of several children, of whom the celebrated wit and scholar, Dr. Ralph Bathurst, president of Trinity College, Oxford; was the eldest, and the youngest was Benjamin, who became governor of the East India and African companies, attained the honor of knighthood, and filled the office of treasurer in the household of queen Anne, when princess of Denmark. By his wife Frances, the daughter of sir Allen Apsley of Apsley in Sussex, sir Benjamin had several children, the eldest of whom was Allen, afterwards created, in queen Anne's celebrated batch of tory peers, lord Bathurst of Battlesden in Bedfordshire. Of him, the convivial intimate of Pope and Swift, and of all the brilliant circle of that Augustan age of literature, it is superfluous to speak to any reader to whom the literary history of their time is not altogether a sealed book. In parliament, a fluent and impassioned speaker, a skilful and practised debater, he maintained an unabating opposition to the government of sir Robert Walpole during the whole of his long monarchy of power, and was regarded as one of the chief champions of toryism in the house of lords. In private life, amiable, benevolent, affectionate, convivial, and witty, he endeared himself to a circle of friends, larger and more distinguished for eminence of every kind than it falls to the lot of many men, of whatever rank, to have conciliated. His seat of Oakley Grove, near Cirencester, beheld partakers of its hospitality, the noble, the witty and the learned of successive generations. Sterne gives an interesting account of his introduction to him in his old age: "He came up to me one day, as I was at the prince of Wales's court. 'I want to know you, Mr. Sterne; but it is fit that you should know also who it is that wishes that pleasure. You have heard of an

old lord Bathurst, of whom your Popes and Swifts have sung and spoken so much. I have lived my life with geniuses of that cast, but have survived them; and despairing ever to find their equals, it is some years since I have cleared my accounts, and shut up my books, with thoughts of never opening them again. But you have kindled a desire in me of opening them once more before I die, which now I do; so go home and dine with me.' This nobleman, I say, is a prodigy: for at eighty-five he has all the wit and promptness of a man of thirty; a disposition to be pleased, and a power to please others, beyond whatever I knew; added to which, a man of learning, courtesy, and feeling." He did indeed live long enough to survive all the illustrious associates of his early manhood, but he lived also to enjoy the rare fortune of seeing his son presiding over the dignified assembly in which he had himself achieved so much distinction; a fortune which none but the father of sir Thomas More had known before him — and to receive at the hands of that son the patent of an earldom.<sup>1</sup> The magnificent passage, in which Burke applied this signal instance of worldly felicity to illustrate the eloquent arguments so vainly reiterated against a blind and fatal perseverance in misgovernment, often as it has been admired and quoted, is too apposite to our subject to be omitted here. "The growth of our national prosperity," said the orator, in his speech on the conciliation of America, "has happened within the short period of the life of man. It has happened within sixty-eight years. There are those alive whose memory might touch the two extremities. For instance, my lord Bathurst might remember all the stages of the progress. He was, in 1704, of an age at least to be able to comprehend such things. He was then old enough, *acta*

<sup>1</sup> He was created, in 1772, earl Bathurst, of Bathurst, in the county of Summex.

*parentum jam legere et quæ sit poterit cognoscere virtus.*  
Suppose, sir, that the angel of this auspicious youth, foreseeing the many virtues which made him one of the most amiable, as he is one of the most fortunate, men of his age, had opened to him in vision, that when, in the fourth generation, the third prince of the house of Brunswick had sat twelve years on the throne of that nation, which, by the happy issue of moderate and healing councils was to be made Great Britain, he should see his son, lord chancellor of England, turn back the current of hereditary rank to its fountain, and raise him to a higher rank of the peerage, whilst he enriched the family with a new one. If, amidst these bright and happy scenes of domestic honor and prosperity, that angel should have drawn up the curtain, and unfolded the rising glories of his country, and whilst he was gazing with admiration on the then commercial grandeur of England, the genius should point out to him a little speck, scarce visible in the mass of the national interest, a small seminal principle, rather than a formed body, and should tell him, 'Young man, there is America, which at this day serves for little more than to amuse you with stories of savage men and uncouth manners; yet shall, before you taste of death, show itself equal to the whole of that commerce which now attracts the envy of the world.' . . . If this state of his country had been foretold to him, would it not require all the sanguine credulity of youth, and all the fervid glow of enthusiasm, to make him believe it? Fortunate man, he has lived to see it! Fortunate indeed, if he lives to see nothing that shall vary the prospect, and cloud the setting of his day!" And he did not: a few months after those eloquent sentences were uttered, he died peacefully, full of years and honor, at the great age of ninety; having retained to the close of his protracted life, not only the cheerful and happy temper, but even the personal activity, and the relish for convivial enjoyments,

which had distinguished him from his youth up. Until within a month of his death, he regularly rode out on horse-back for two hours in the morning, and drank his bottle of wine after dinner; and used jocosely to declare, that he never could think of adopting Dr. Cadogan's water regimen, inasmuch as no less than fifty years before, Dr. Cheyne had assured him, that he would not live seven years, unless he determined to abridge himself of his wine. A well-known anecdote relates of him, that having, about two years before his death, invited a party of friends to his seat near Cirencester, and their conviviality being protracted one evening to a pretty late hour, his son, the chancellor, objecting to so long a sitting, and dilating on the benefit of regular hours to health and longevity, was suffered to retire to his chamber; but no sooner had he gone than the jovial father cried: "Come, my good friends, since the old gentleman is gone to bed, I think we may venture to crack another bottle!"<sup>1</sup>

Lord Bathurst married, early in life, his cousin-german, the only daughter of sir Peter Apsley, by whom he had nine children, four sons and five daughters. In one of his letters to Swift, of the date of 1730, alluding laughingly to the dean's humorous proposal to relieve the poor of Ireland by fattening their children for the table, he says: "I did immediately propose it to lady Bathurst as your advice, particularly for her last boy, which was born the plumpest and finest thing that could be seen; but she fell into a passion, and bid me send you word that she would not follow up your direction, but that she would breed him up to be a parson, and he should live upon the fat of the land; or a lawyer, and then, instead of being eat himself, he should devour others. You know women in a passion never mind what

<sup>1</sup> The obituaries of the day cite this story as a proof of the grave and temperate habits of the chancellor when a young man. The hopeful youth was at that time about the ripe age of sixty.

they say ; but as she is a very reasonable woman, I have almost brought her over now to your opinion ; and have convinced her that, as matters stood, we could not possibly maintain all the nine ; she does begin to think it reasonable that the youngest should raise fortunes for the eldest." This eldest was Benjamin, who died without issue in 1767 ; of the second son, Henry, we are now to give a somewhat more particular account.

He was born on the 20th of May, 1714, and having gone through the usual course of school discipline, was entered of Christchurch, Oxford, where he graduated B. A. in the year 1733. He had in the meantime kept terms at Lincoln's Inn, and in Hilary term, 1735-1736, was called to the bar by that society. The practice he obtained was of a very limited nature, and certainly altogether inadequate, to account for his subsequent elevation. His name occurs very unfrequently in the reports : in the state trials we meet with him on one occasion only, as leading counsel for the prosecution in the extraordinary case of Mary Blandy, tried for the poisoning of her father, at the Oxford assizes, 1752. His professional views, however, were, as was natural from his father's large party connexions, made subservient to, or at least dependent on, his political. He was introduced into parliament at the first opportunity afforded him after he attained his majority ; being returned at the general election of 1735 for Cirencester, for which borough he continued to sit until his elevation to the bench. He attached himself warmly to the same party in the ranks of which his father had so long combated ; and although he does not appear to have spoken very often, his vote was never wanting to swell the growing minority against sir Robert Walpole. On the dissolution of Walpole's cabinet, and the accession of the Pelhams to power, in the following year, he voted for some years with the government, under which his father held for a short period the office of captain of the



band of gentlemen pensioners. But, in the year 1745, he was appointed solicitor general (he became in 1748 attorney general) to Frederic, prince of Wales, then at the very height of his dissensions with his father; and, as in duty bound, found no difficulty in again severing his connexions with the court, and passing through the neutral region of a cold and distrustful respect to an hostility as unmitigated as that which he had opposed to the former ministry.

The unlooked-for death of the prince, in the same year, scattered at once all the hopes of the faction of Leicester-house. The "rising sun" was prematurely set, and the hands of the government were so effectually strengthened by the dissolution of his party, as to leave those who built their prospects on political advancement, much too distant a hope of success by a perseverance in opposition. Mr. Bathurst, accordingly, was not long found in the camp of the anti-ministerial forces. Little more than two years afterwards, he was so far from occupying a position adverse to the government, as to be selected, on the recommendation of lord Hardwicke, to fill a vacant place on the bench of the common pleas, where he took his seat on the 6th of May, 1754; his colleagues being lord chief justice Willes, Mr. Justice Clive, and Mr. Justice Noel. This quiet and uneventful post he occupied for the period of seventeen years.

The court of common pleas, from the limited nature of its jurisdiction, and the still more limited extent of its business, could seldom, if ever, be the scene of forensic contest of that general and stirring interest of which the criminal judicature of the king's bench made that court at times the theatre, and which, on even more solemn and national occasions, has awakened the echoes of Westminster hall, or thronged the galleries of the house of lords. During the period, however, in which Mr. Justice Bathurst sat there, the trials and discussions arising out of the government crusade against Wilkes and his North Briton, which the

popular opinions of lord Camden had attracted to his court, animated, for a time, its dull and stilly atmosphere, and choked its narrow space with the multitudes who crowded to swell the triumph of that notable *patriot*. Mr. Justice Bathurst concurred in opinion with lord Camden, both on the right of the commons to privilege from arrest for libel, and in refusing new trials to the defendants who complained of excessive damages, in the actions brought against them for seizures under the secretary of state's warrants. Very few of the other reported cases, on which he had to adjudicate, were of any other than merely legal interest. In one instance, and that a ludicrous one enough, the court were equally divided in opinion<sup>1</sup>—the question being, whether a surgeon and apothecary, not qualified by estate or degree to destroy partridges, was an "inferior tradesman" within the meaning of the aristocratical statute of William and Mary, which subjects to full costs in trespass such "dissolute persons" as, "neglecting their employments," should go forth in quest of game. Mr. Justice Bathurst delivered his opinion, that "the legislature could never intend to permit every master of *every little mechanic trade* to neglect his trade and go a-hunting;" and that the only line that could possibly be drawn between inferior and superior was, that every tradesman was inferior who was not qualified; and he was inclined to think the parliament penned the act so obscurely, in order not to disoblige their constituents, many of whom were tradesmen! Oh that we might venture to ascribe the same considerate motives to the legislators of our days. This weighty matter was three or four times argued. In another case,<sup>2</sup> in which it was held that a bond in consideration of past cohabitation was good in law, Mr. Justice Bathurst enriched his judgment by quo-

<sup>1</sup> *Buxton v. Mingay*, 2 Wils. 70.

<sup>2</sup> *Turner v. Vaughan*, 2 Wils. 339.

quotations from the books of Exodus and Deuteronomy, and thence arrived at the conclusion, that "*wherever it appears that the man is the seducer*, the bond is good." We wonder when a case will occur, in which the question of the validity of the bond, the woman being the seducer, shall be solemnly adjudged and reported.

In January, 1770, on the dismissal of lord Camden from the chancellorship, and the unhappy death of lord Morden (Charles Yorke), the seals were put into commission, Mr. baron Smythe (afterwards chief baron), Mr. Justice Bathurst, and Mr. Justice Aston, being the commissioners. Their decrees, in the more important cases at least, were believed to be drawn up for them by lord Mansfield: in particular that in the case of *Tothil v. Pitt*,<sup>1</sup> wherein, reversing the judgment of the master of the rolls, sir Thomas Sewell, they held the devise in the will of sir William Pynsent, under which lord Chatham claimed the Burton Pynsent estate, invalid by reason of a prior devise of it in the will of the former proprietor, which his honor had adjudged void as tending to a perpetuity. This judgment gave so much dissatisfaction to the profession, that, on an appeal to the house of lords, the case, at the suggestion of lord Mansfield was submitted to the opinion of the other judges, and, upon their answer, the decree of the commissioners was reversed. They retained the seals until the month of January in the following year (1771), when they were delivered to Mr. Justice Bathurst, with the dignity of lord chancellor, and he was raised to the peerage by the title of lord Apsley, baron of Apsley, in the county of Sussex. The appointment excited no small amount of surprise in the profession. Sir Fletcher Norton observed upon it, "that what the three could not do, was given to the most incapable of the three."

<sup>1</sup> Dickens, 431.

The malicious muse of sir Charles Hanbury Williams numbers him in the tory band, who

" Were cursed and stigmatized by power,  
And raised to be exposed."

The writer whom we quoted in the outset is equally complimentary. "He travelled all the stages of the law with a rapidity that great power and interest can alone in the same degree accelerate. His professional career, in his several official situations, was never prominently auspicious till that wonderful day when he leaped at once into the foremost seat of the law. Every individual member of the profession stood amazed; but time, the great reconciler of strange events, conciliated matters even here. It was seen that the noble earl was called upon, from high authority, to fill an important office, which no other could be conveniently found to occupy. Lord Camden had retired, without any abatement of rooted disgust, far beyond the reach of persuasion to remove. The great Charles Yorke, the unhappy victim of an unworldly sensibility, had just resigned the seals and an inestimable life together. Where could the eye of administration be directed? The rage of party ran in torrents of fire. The then attorney and solicitor-general were at the moment thought ineligible.—perhaps the noble lord then at the head of affairs, who was yet untried, had a policy in not forwarding transcendent ability to obscure his own. Every such apprehension vanished upon the present appointment. This man could raise no sensation of envy as a rival, or fear as an enemy." His judicial incompetency was indeed unfortunately too obvious. Sir Alexander Macdonald begins one of his conversations with Dr. Johnson, on his visit to London, in 1772, with a remark, suggested, we presume, by a recent visit to Lincoln's Inn hall, "that the chancellors in England are chosen from views much inferior to the office, being chosen from tempo-

vary political views ;" a state of things, according to the doctor, inseparable from all but a pure despotism. Wilkes, according to Horace Walpole, stated his opinion of the chancellor's qualifications extremely *apropos*. It was hinted to him, on his election to the mayoralty, that his lordship intended to signify to him that the king did not approve the city's choice. He replied, " Then I shall signify to his lordship, that I am at least as fit to be lord mayor as he to be lord chancellor." This, continues Walpole, " being more gospel than everything Mr. Wilkes says, the formal approbation was given." To preside with efficient control and entire self-dependence, in a court wherein the massive intellect of Thurlow and the acute sophistry of Wedderburn were daily in the lists of contest, would indeed have exercised all the learning and all the mental powers of a Hardwicke or an Eldon. Well, therefore, might it be said of lord Bathurst, a lawyer indeed of fair attainments, but imperfectly conversant with equity principles and practice, and unendowed with any vigor of intellect which could enable him to apprehend them, as we have seen achieved in our day by the intuitive facility of a Lyndhurst — that he never entered the court of chancery with a firm and dauntless step. On several occasions, we find him applying to the registrar (Mr. Dickens, the reporter of the cases in chancery for many years), not merely for oral information on matters of practice, but for formal written opinions and abstracts of the authorities, which he delivered to the bar as his judgments. Having called in the master of the rolls, sir Thomas Sewell, to his assistance in a case of some importance — and after the statement of his honor's opinion — " I ought to apologize," says the superior judge, " for keeping the matter so long before the court: at first I differed in opinion with his honor, but he hath now convinced me, and I entirely concede to his honor's opinion, and am first to thank him for the great trouble he hath

taken on the occasion." Such was the learned lord in the court of chancery. In the house of lords, he appeared as the unshrinking advocate of those unhappy councils which ended in the dismemberment of our colonial empire. "What!" said he, in the debate on the reception of general Gates's letter — "What! acknowledge the independency of America, and withdraw our army and our fleet! Confess the superiority of America, and wait her mercy! He desired the house to consult their own feelings for an answer." Alas! that answer the stern necessity of repeated humiliations too speedily supplied! The chancellor appears to have figured as the chief vindicator of the purity of lord North's cabinet, and the independence of his partisans. When lord Effingham, in the debate on his motion relative to the state of the navy, in 1778, remarked that "the first lord of the admiralty knew his strength in a division; he would go below the bar, and take with him his — he had like to have said, servile majority," the lord chancellor left the woolsack in great warmth, and asked, were their lordships to be so grossly insulted without a rebuke? "He had sat in that house seven years, and never before heard so indecent a charge. A servile majority! The insinuation was not warrantable. He had, for one, voted in favor of the measures of government; but would any lord venture to say he was under influence? The ministers knew his place was no tie upon him; they knew he always gave his vote freely, and according to his real opinion. *He* was born the heir of a seat in that assembly; he enjoyed a peerage as his hereditary right. He could not, *therefore*, sit still and hear the noble earl talk of a servile majority, and he was amazed that government had so long suffered themselves to be abused; he hoped they would no longer be patient under such a continued strain of invective, but would take the proper means to prevent it in future." His lordship was perhaps right in ascribing more weight to the dignity he

derived from an hereditary source, than that which he owed to his professional advancement. On a subsequent occasion, when again magnifying his own political purity, and attacking the motives and principles of the opposition, he was somewhat unpalatably reminded of his own anti-ministerial career. "He had, for a long series of years," he said, "served his sovereign in several capacities, and he could lay his hand on his heart, and with truth affirm that he had always acted for the good of his country, to the best of his abilities, and that there was nothing the crown had to bestow which could induce him to give a vote contrary to his conscience, or declare against what seemed to him to be the real interest of his country. If he was not very opulent, he had sufficient to put him above the poor temptations of place and emolument" — with much more to the like effect. The conduct of the opposition arose, he alleged, "from a wicked ambition; a lust of power and dominion; a thirst after the emoluments of office. It sprung from corruption, and the worst species of corruption, because it was incurable — a corruption of the heart." The duke of Richmond observed, upon this estimate of the motives of a parliamentary opposition, "that he was ready to take his lordship's word for every syllable of the doctrine, so far as it applied to himself. There was a period, and a long and perhaps the most valuable period of his lordship's life, when *he* was known to be in strong opposition to the measures of the court. His lordship, it might be fairly presumed, now spoke as he once felt; he spoke from long experience. No man was a better judge of the various operations of the human mind under such circumstances, and so far as he retained a recollection of what passed in his own, it was scarcely to be doubted, it was fair to conclude, that a wicked, corroding ambition, whetted and increased by unavailing attempts, and a state of political despair, were, in his lordship's contemplation, ever produc-

tive of malice and personal enmity, and that worst species of corruption, a corrupt heart —”

“ Quis tulerit Gracchos de seditione querentes ? ”

Lord Bathurst (he succeeded to the earldom, and to the barony of Bathurst, on his father's death in 1775) appears to have taken little part in the actual business of legislation. He had a chief hand in the framing of the royal marriage act, the provisions of which he defended with a chivalry that none but its parent could have exhibited. “ He should be unworthy of the situation he was in, if he could not defend every clause, every sentence, every word, every syllable, and every letter in it. He would not consent to any amendment whatever: it could not be mended. If any inconveniences arose, parliament would remedy them *a hundred years hence*; all power might be abused, but it was better to risk that than not to give this power — *the king could not make a bad use of it, because parliament would punish the minister who advised the king ill.*” The only case of peculiar interest which came, by appeal, into the house of lords while he occupied the woolsack, was that of *Becket v. Donaldson*, in which the question as to the right of literary property was so fully and learnedly discussed. The chancellor concurred in the opinion of the majority of the judges, that neither by the common law nor under the statute of Anne, could any exclusive right be sustained. He went at much length into the legal bearings of the case, and gave an interesting historical detail, illustrated by original letters, of the proceedings in both houses during the passing of the statute, all tending to show that the sense of the legislature, at that period, was against the right: but he wisely abstained from debating the doubtful ground of public policy, or, like lord Camden, overlaying his legal conclusions with rhetorical declamations on the meanness of writing for bread, and the superiority of glory



as the reward of literary labor. His father, who had been witness to the "acquisitiveness" of Pope, and had himself been the depositary of poor Gay's little savings, could have assured him that such a doctrine found, at all events, small acceptance in their day.

Lord Bathurst does not appear to have inherited much of his father's fondness for the society of literary men, or to have extended to them a very liberal patronage. He bestowed, however, unsolicited, a commissionership of bankruptcy on sir William (then Mr.) Jones, and intended, had he retained the seals long enough, to have appointed him, notwithstanding the extreme character (as it was then deemed) of his political opinions, to an Indian judgeship, the great object of his hopes, which he subsequently obtained at the hands of the coalition ministry. Mr. Jones acknowledged his patronage, in the most glowing terms of gratitude, in the dedication of his *Isæus*. "Your lordship," he said, "has been my greatest, my only benefactor; without any solicitation, or any request on my part, you gave me a substantial and permanent token of regard, which you rendered still more valuable by your obliging manner of giving it, and which has been literally the sole fruit that I have gathered from an incessant course of very painful toil; your kind intentions extended to a larger field; and you had even determined to reward me in a manner the most agreeable both to my inclinations and to the nature of my studies, if an event, which, as it procured an accession to your happiness, could not but conduce to mine, had not prevented the full effects of your kindness." The chancellor incurred considerable observation and censure by conferring a chaplaincy on Martin Madan, the translator of Juvenal, whose heterodox opinions and indifferent morals were then tolerably notorious, and who afterwards gave such serious offence to the church by the publication of his *Thelyphthora* — a defence, hardly disguised, of the prac-

tice, or at least the doctrine, of polygamy. His lordship's ecclesiastical patronage was, on one occasion, solicited in a manner of which it is just to say that it exhibited only the unequalled assurance of the applicant, and infers no reproach whatever against the honor or integrity of the patron. On the living of St. George's, Hanover Square, falling vacant, lady Apsley received an anonymous letter, offering a sum of 3000 guineas, if by her assistance the writer were presented to it. The letter was traced to the unhappy profligate Dodd, and led to his dismissal with disgrace from the office of king's chaplain.

In the summer of 1778, lord Bathurst, finding his health unequal to the labors of his office, resigned the great seal; and, as it is stated in the *Biographia*, declined to receive a pension offered to him on his retirement, although he is affirmed to have been a man of parsimonious habits. In the November of the following year, however, he was appointed to the dignified office of president of the council, which he retained until the breaking up of lord North's administration. The last occasion on which he distinguished himself as a speaker, before his resignation of office, was in vehement opposition to the bill for securing an annuity to the family of lord Chatham, who, he contended, had been amply repaid for all his services by the pension he enjoyed during his life, and his appointment to the privy seal. The chancellor found himself, on this occasion, leader of a generous minority of eleven, and consoled himself under his defeat by recording in a protest his dissent from a measure, which, he apprehended, "might in after times be made use of as a precedent for factious purposes, and to the enriching of private families at the public expense;" a profession of honorable economy to which three signatures besides his own were subscribed. He continued to be a frequent speaker in parliament, and a stren-

uous opponent of all the attempts to persuade to the conciliation of America. On several occasions we find him and lord Thurlow, who seems to have entertained an unequivocal dislike for him, in almost direct collision of opinion, though members of the same cabinet. After his final retirement from office, he still continued for some years a regular attendant in his place in parliament, but at length, and for some years before his death, was compelled by the advance of age and the decline of health to withdraw altogether from political life. He died at his seat of Oakley Grove, on the 6th of August, 1794, in his eighty-sixth year.

The mansion of Apsley House was built by lord Bathurst. As soon as it was completed, he was saluted with the agreeable intelligence that he had encroached upon a plot of ground granted by the crown to a veteran soldier, whose widow threatened him with a suit in chancery. Having bought off her claims at the price of a considerable sum of money, it became a standing joke in Lincoln's Inn hall, (a joke with a double aspect,) that an old woman could beat the chancellor in his own court.

Lord Bathurst was twice married; first, to Anne, (only child of a gentleman named James, and widow of Charles Philips, Esq.) who died without children; secondly, to Tryphena, daughter of Thomas Scawen, Esq., of Carshalton, in Surrey, by whom he had two sons and four daughters; the eldest of whom, the late noble earl, died in the year 1835, having filled, during a large portion of his life, many and distinguished offices in the service of the crown.

## ART. II.—ON CODIFICATION, OR THE SYSTEMATIZING OF THE LAW.

[By J. LOUIS TELLKAMPF, JUR. Utr. Dr. of Göttingen Univ., and Professor in Union College, New York. Concluded from the last Number.]

### ∴ : *Objections against Codification answered.*

It has been said by objectors, that, 1. No code can be expected to offer such a degree of perfection as would render it absolutely final, and in need of no future improvement; that therefore it must be better to leave things as they are, and not to attempt a thing necessarily so imperfect.

2. That it is impossible to give to a code, in regard to its contents, that *completeness* which shall afford beforehand a decision for the endless entanglement of circumstances in real life.

3. That in the compilation of a comprehensive code, many principles and passages may be treated imperfectly, both as regards themselves and as regards other parts of the system, by taking them out of their previous connection; that each point in law enters variously into ~~all~~ the relations of society; that it must be a matter of surpassing difficulty, to calculate in advance and with any approach to certainty, all the effects of those points, in a code which is to contain so many new laws together with so many old ones; and that if those effects are not considered, so many deficiencies and inconveniences will shortly appear, as to render the work totally inadequate to the intentions of its framers.

4. That the new code would draw all attention *towards itself*, and from the fountains of law; so that the connection might be easily lost with the earlier stages of the science, by the study of which it could alone be hoped to clear

up the obscurities of a jurisprudence which has grown with the lapse of time.

Many of the remaining objections have reference only to the actual condition of particular countries; as, for instance, some of those contained in the essay of Mr. von Savigny,<sup>1</sup> a Prussian professor and statesman, would seem to apply chiefly to Germany, where the Roman law forms the great basis of the jurisprudence, and has been worked up with the German, the canon, and the feudal law into a system, which, from its variety, seems particularly suited to the complicated relations of that country; relations which arose out of the historical development of the common bands which have been entwined round the German states, by the Roman empire, the Christian religion, and the Teutonic institutions. For the close investigation and the better understanding of the Roman law, the times are most favorably circumstanced; in the recent discovery of the Institutes of Gaius, and in the general attention which has been of late directed to jurisprudence; as well of the Roman as German law; so that it would certainly be unadvisable to stay at this moment, by the enactment of a code, the further progress of these not yet completed investigations.

To these four objections, touching all codes in general, the following remarks may serve as preliminary replies.

In regard to the first objection I would say: To demand from a code that degree of perfection which shall render it absolutely final, and in need of no further improvement; and, because of the impossibility of ever attaining such a degree of perfection, to abstain from any attempt at a thing necessarily imperfect, would argue misapprehension of the nature of finite things. As everything in this world is

<sup>1</sup> On the fitness of the present age for legislation and jurisprudence. Berlin, 1815, pages 73 and 107. Hugo, in the *Civilian Göttingen Magazine*, vol. iv. page 89.

imperfect, it would be extremely irrational to reject all attempts to realize the formation of a code, because the result must be imperfect.

Perfection is meant to denote the full and well-ordered system of all things pertaining to a certain sphere; in this sense no art or science can be considered perfect. But should we, for that reason, abstain from embodying into a system all that is known of a certain subject, just because additions may be made to our knowledge of it; or the more important part of it be still unknown? In this way we should never advance. Every code might be better — so at least idle speculation can affirm; for the noblest, the grandest, and the most beautiful of all the works of art, might be imagined more noble, more grand, and more beautiful.

Of the second objection: To expect of a code a minute completeness, offering, mechanically, a specific solution for each of the endless occurrences in life, is evidently unreasonable, and would argue in the person entertaining the expectation, a great misapprehension of the nature of a code, and indeed of jurisprudence itself. A code holding out such hopes would be found as delusive, as a medical guide-book professing to contain a specific remedy for every disease, without presupposing in the person consulting it, a knowledge of the science and practice of medicine.

In the application of codes, just as in that of laws, to the solution of particular cases, difficulties must be expected to arise; but they will be met with less frequently in the increase of order and system in the code. When, however, difficulties of that nature do occur, it will be for the understanding of the lawyers and the judges to clear them up, for the very reason that jurisprudence, even in its application to the affairs of life, has a reasonable and living nature, and not one that is mechanical.

In every important case, therefore, besides a code there

would always be wanted the assistance of scientific lawyers, whose pecuniary interests consequently would not be narrowed by the change, and who would, moreover, have the advantage of a less toilsome study, and of an increase in their attachment to their honorable profession, at present rendered distasteful to many by the difficulty of entering satisfactorily and thoroughly into its spirit, as each individual, in pursuit of a knowledge of its fountains and its literature, must work anew the mass of materials of which it is composed, or rather by which it is encumbered. Every lawyer, conscientiously applying himself to his profession, must have often felt his endeavors restrained by this circumstance, or, at least, painfully retarded.

Thirdly : That great caution is doubtless necessary in the language of a code cannot be denied ; but that it is not impossible to avoid the dangers specified in the third objection, we shall endeavor to prove at a later period, by showing the care that ought to be observed, as well in the choice of the individuals to whose learning the compilation of the code would have to be entrusted, as in the composition of the code itself.

As to the fourth objection : That the code would interfere with the study of the ancient fountains, which applies principally to the science of law ; students could never, for any length of time, lose sight of and neglect the importance of an accurate study of these fountains.

The question, nevertheless, as to the propriety of a code for each state, may be considered as resolving itself into this simple form : Whether it be not better, at least, to improve, although perfection cannot be at once attained, but must be reached by gradual approximations. But if, in the present favorable circumstances of this country, the capacity for extracting the spirit of the laws be denied to the educated portion of the American people, or its class of jurisconsults, it would not only reflect discredit upon the

community, but even present the incongruity of a nation, with the ocular proof of its capacity furnished in the existence of many good laws, not being able to confide in the skill of its learned men, merely to digest those laws into a well-ordered system. Moreover, it is just this systematizing, or reducing to general principles, which is the irresistible tendency of the present times.

Jurisprudence must be handled with thought; it must be a system in itself, and can only, as such, have credit with civilized nations.

The sun and the planets have their laws, but they know them not; barbarians and savages are ruled by instinct, custom, feeling, but with no clear knowledge thereof; and it is only when jurisprudence is taken up, in its true spirit and with thought, and its purity ascertained by the light of reason, that it can be freed from the accidents of feeling, crudeness, selfishness, and be invested with its real precision, whereby impartial justice may be administered, and be made to acquire reverence in the eyes of the people.

It is a principle of universal application and of imperative necessity, that laws, carrying with them the obligation of obedience, ought first to be made known and be rendered intelligible to all men. The book of the laws, therefore, must be a book of easy comprehension to the people in general. The *Leipsic Gazette* of this spring states, that, in Prussia, "the minister of justice has issued an order for the suppression of all Latin and French terms in legal documents and proceedings, and for the adoption of a plain style which can be understood by the people in general." Since the English language is sufficiently copious to express whatever ideas and terms anglo-Americans have need of; and since it is necessary in cases of importance that men should not only be able to know what their lawyers are talking about, but also the very words of the laws, without the necessity of being learned in a dead or foreign language,



- it must consequently be necessary that the laws be translated entirely into the English language. These same reasons, which we have mentioned with respect to the English laws, will apply with the same force to any other language which may be spoken by a sufficient number of people to pay the expense of publication, just as in countries of Europe, the code Napoleon was translated into the languages of all those countries where it was introduced.

To hang up the laws on a high pillar, as Dionysius the tyrant did, so that no citizen could read them; or, which amounts to the same thing, to bury them under all the materials of learned books, customs, scattered statutes, and collections of decisions or conflicting judgments and opinions, so that a knowledge of jurisprudence can be attained by only a few of the people; such a state of things can in no wise be justified. Those governments which have given their people well-ordered and precise systems of laws, have not only been the greatest benefactors of those committed to their care, but have moreover performed a great act of justice. Jurisprudence has for its object the development of rational freedom, the holiest and most noble of man's capabilities. It ought, therefore, to be made known to him, so much of it at least as may be intended to be binding on his actions.

If I may now consider these objections as refuted and the necessity established of a systematic arrangement of the laws, in unison with the demands of modern times; or, in other words, the necessity of a code; it shall now be the object of my endeavors to set forth the manner in which such a code ought to be compiled, so as to render it most suitable to the ends of its establishment.

### *The code.*

A code should contain a system of leading principles, arranged in such order that the right mode for determining

any particular case should be visible on the face of it, and be within the grasp of any person of scientific attainments.<sup>1</sup> A compilation of that kind would presuppose, (a) with regard to the substance, a perfect comprehension of the leading fundamental principles of the laws as they then stood, always with reference to the relative weight of those principles themselves, and to the whole; consequently a perfect mastery of all the materials. The following remarks, bearing directly upon the subject, have been taken from pages 23 and 24 and page 26 of the report on the Codification of the Common Law of Massachusetts, 1837. "The general principles of law are often denominated, in the juridical language of continental Europe, emphatically as law—the application of those principles as jurisprudence." "The commissioners are of opinion, that it is expedient to reduce to a code those principles which are of daily use and familiar application to the common business of life, and the present state of property and personal rights and contracts, and which are now so far ascertained and established as to admit of a scientific form and arrangement, and are capable of being announced in distinct and determinate propositions."

(b) With regard to the form, a style so clear and intelligible as to call forth the same ideas in the mind of every person hearing the words of the laws.<sup>2</sup>

<sup>1</sup> This opinion differs widely from that which would overcome an impossibility, and have a decision upon each case cut and dried: in other words, a material completeness.

<sup>2</sup> That a style clear and precise, and an artless mode of expression, are requisites of paramount importance to good laws, is admirably expressed in the following words of Quintilian: "Prima sit virtus perspicuitas, rectus ordo, propria verba, nihil denique desit, neque superfluum; ita sermo et doctis probabilis et planus imperitis erit." Montesquieu has expressed himself in a similar strain, (*de l'esprit des lois*, tome iv. livre xxix. chapitre xvi.) "Ceux qui ont un Génie assez étendu pour pouvoir donner des lois à leur nation ou à une autre, doivent faire de certaines attentions sur la manière de les former.

The first step in the composition of a code will necessarily be to collect, with all care, the greatest amount possible of the materials of law; to divest them of everything obsolete; and, by discarding all the circumstances of their growth out of individual cases, to set them forth in the pure and broad garb of ideal or theoretical axioms.<sup>1</sup> The code itself should be composed, not so much with a view of creating a system of perfectly new laws, but rather for the purpose of extracting from the given materials in law, the leading principles of the existing system, in general but precise terms. These principles must be seized in thought, and be made the basis whereon to conduct an inquiry into the internal connection and the nature of the relationship of these several principles with the great leading points of jurisprudence; and their true nature having now been fully ascertained, it will be possible to calculate, as it were, with these principles, in order to appreciate beforehand the probable results of any combination of them into a rule of action. This, doubtless, may be classed amongst the most difficult problems of the science, and will require investigations, not only into the gradual growth of these laws, but also into the history of those circumstances from which these laws originally sprang, and which the altered state of the times may no more allow to be sufficient grounds for the existence of those laws; as, for instance, in the provisions of the old English law for the imprisonment of debtors.

Les style en doit être concis; les lois des douze tables sont un modele de précision: les enfans les apprennaient par cœur. Les nouvelles de Justinian sont si diffuses qu'il fallat les abrégér. Le style des lois doit être simple. L'expression directe s'entend *toujours* mieux que l'expression réfléchie. Quand le style des lois est enflé, on ne les regarde que comme un ouvrage d'ostentation. Lorsque dans une loi, les exceptions, limitations, modifications, ne sont point nécessaires, il vaut beaucoup mieux, n'en point mettre: de pareils détails jettent dans de nouveaux détails," etc.

<sup>1</sup> On this point much has already been done by the revisions.

The absurdity of seeing thousands of free citizens imprisoned, because of their inability to pay a few dollars, gradually led, in the states, to the repeal of this law. The more humane laws of modern times punish only the fraudulent debtor, not honest poverty. In the room of these enactments, and of others of a similar nature, laws must be passed more in harmony with the relations of the day, more reasonable, and more in accordance with the spirit of jurisprudence. These changes ought not, however, to prejudice the vested rights of individuals, and where the public good nevertheless demands their sacrifice, compensation ought to be awarded according to an equitable standard.

From the above remarks, it may be collected that the end and intention of a code are to combine the principles of law, which are derived from history, into one system with the principles of law which are found in our reason, have been approved of by philosophy, and may be looked upon as the result of the high degree of civilization of modern times.

In the composition, therefore, of a comprehensive code, it will not be sufficient merely to work up the historical facts into a system, but the aid of a philosophical knowledge of civil and political life will also be required, as it is only when all the legal relations of external life have been regulated according to reason, that the long-enduring validity of a general code may be calculated upon. The philosophical consideration, moreover, of the historical development of jurisprudence will afford to lawyers, in the experience of past ages, valuable instructions as to what is necessary in law and what is merely incidental. In this manner a system of perfect law may be built up, approving itself as the beautiful and free expression of the internal life of a people, proceeding out of its being, and enduring with its principles. And jurisprudence will have acquired from the code, by being reduced to the simplest and best-ordered form, its attributes of certainty, perspicuity, and method.

That a code must contain also the civil process, or the rules of legal procedure, and even the criminal law, will be assented to by all competent judges, without any further remarks.

The prosperous condition of the law must be ever dependent upon three grand requisites :

1st. Full and clear sources of the law.

2d. An able body of lawyers.<sup>1</sup>

3d. A suitable civil process.

As the first of these facts is the subject of the whole of the present essay, it will be unnecessary to treat it specially here.

In regard to the second, I quote from the "Commentaries" of chancellor Kent, "on American Law," vol. i. part 2, of the Judicial Department. "The organization of the judiciary establishment has stood the test of experience, and has been so successful and beneficial in its operations, that the administration of justice has been constantly rising in influence and reputation." And this will always be the case if the judiciary department be kept independent, as well from the executive as from the people, by being appointed to hold their office during good behavior. But if even the higher judges were elected for a short time, so as to produce a rotation in that department, then petty lawyers only would have the office, because the greater jurists would not accept it; justice would then become a party matter, and all true security of person and property be destroyed. Kent admires the English rule of appointing judges to hold their office during good behavior; but Prussia makes the judiciary power still more independent of the king and people, by appointment for life, and removable for

<sup>1</sup> Compare the above-mentioned "Report on the Codification of the Common Law of Massachusetts," page 26, §§ 3, 4.

crime only.<sup>1</sup> With respect to the third ; as the law can only attain perfect efficiency by means of a good civil process, we now proceed to the consideration of this point.

The principle upon which the civil processes of this country are founded, are suited to the nature of things, and may be carried through with strict consistency.

The obstructions to the establishment of a good civil process, as well as want of despatch in suits, injure greatly the security of rights, consequently the value of those rights.

For this reason it is, that rights, on account of which suits have been instituted, lose greatly in value when the process is faulty ; therefore credit depends considerably on the condition of the civil process.

A faulty civil process would deprive the best laws of effect, and even weaken the authority of legislation itself, because a regard for the laws is always diminished when they have not sufficient power and energy. Formalities are requisite both in the civil and criminal process, in so far as they conduce to the reasonable security of the liberty of the accused. But their excess must strike at the root of all good legislation. In the criminal laws, again, more than in any other portion of jurisprudence, the proof has been frequently furnished of the necessity of modifying according to the demands of the times. What an extraordinary contrast is to be found in the cruelties of the punishments of the middle ages and the earlier centuries, compared with the really christian mildness and reasonable severity of the present American penal laws, particularly in the penitentiaries of this country, which truly do honor to America, by showing that it has never forgotten that the erring man

<sup>1</sup> "Ceux qui ont dans leurs mains les lois pour gouverner les peuples doivent toujours se laisser gouverner eux mêmes par les lois." Fénelon. See the speech of G. C. Verplank on the amendment of the law and the reform of the judiciary system in the state of New York, 1839.

was once a citizen, and, although in prison, is a human being capable of improvement.

*On the nature of an assembly in each state, for the purpose of framing a code of its laws.*

In order that a code may, above all things, possess those qualities so necessary to all systems, *unity* and *consistency*, the plan of the whole as well as its final wording must be the work of one individual, whose ideas and expressions may afterwards be examined, and amended by others.

The greatest care must be used in the election of this individual and his coadjutors, for whose judicious choice the following remark may serve as a guide. Without an historical and philosophical investigation of the existing laws, it can hardly be expected that a good system of jurisprudence will be produced; so that it is greatly desirable that the president as well as the members of this assembly shall possess, equally, an historical and philosophical turn of mind, but from the rareness of this twofold scientific disposition, the greater care ought to be taken to elect such men only as are distinguished, or at least that some of them should be familiar with the philosophy, and others with the history of jurisprudence.

In order to set forth still more clearly the importance of having the members of this body possessed of these qualifications, or at least distinguished for one or the other of them, I shall endeavor to expose, separately, the result of both.

With regard, in the first place, to the historical elements of positive law, Montesquieu, Savigny, and Thibaut have admirably laid down what ought to be looked upon as the true opinion. Montesquieu chiefly directs his remarks to the circumstance, that legislation itself and its particular rules ought not to be considered as isolated and abstract objects, but as subordinate parts of one whole, intimately connected with all those other regulations which make up

the character of a nation and of a certain period, and which obtain through that connection their real meaning, as well as their justification.

Savigny's<sup>1</sup> remarks are of a similar tendency, and go to prove that this historical disposition is indispensable in legislation, in order to render it possible to seize distinctly the peculiar features of each period and of each law, and to view each idea and sentence in a living connection with the whole; that is to say, in the proportions which are alone natural and true.

A similar opinion is expressed by Thibaut, in the following words.<sup>2</sup> "The historico-philosophical jurist is undeniably the only one who can really solve a given problem; who can even discover that a problem has been propounded for closer inquiry. He is in possession of distinct and exactly developed ideas on the difference between the duties of compulsion and those of conscience, and on the nature of stern law and equity. He now opens his book of the law, and finds cases decided after the same principles, but nowhere those principles themselves; and decisions, not always in accordance with those principles. Here he discovers a problem—he questions history for a solution; if she is silent, he turns to his philosophy. Perhaps we should have decided according to our philosophy or our common sense, just in the same way as our forefathers and the Romans did. Why then not explain those decisions with the help of the same reasons, which will always make intelligent the decisions of common sense. It may also happen, on the other hand, that history offers means of interpretation; that perhaps an excessive bias toward lenity,

<sup>1</sup> Savigny, on the Fitness of the present age for Legislation and Jurisprudence, page 48.

<sup>2</sup> Thibaut, *Versuche über einzelne Theile der Theorie des Rechts*, Band. 1, page 141.



may be most naturally explained by an effeminate, over-refined, and overheated character of the people, or from other external circumstances. These remarks serve only to show that philosophy and history can and ought to go hand in hand."

And is it, then, indeed possible to understand the present condition of an organic state of things which has not yet been sufficiently explained, without putting it in connection with its past history?

Out of that which once looked like law, there has proceeded the law which holds at present, and which is therefore only *what* it is and *as* it is, because the old, in the act of becoming obsolete, gave birth to the new. In the past times of thousands of years, the germ is contained for the legislation which now rules our conduct. The blossom must decay, that the fruit may be matured. But can we understand the production of the fruit, without going back from its existence to its origin, and from its origin to the first principles of its essence? It is only the ignoble spirit who stands gaping at that which is, and sees no further, and will not see further, than that it is, but the *how?* and the *why?* have been reserved for the spirits of the better class only.

Confined to its own sphere, there is much merit in considering the beginning and the development of laws as they appear in the course of time; which is a purely historical labor, establishing the knowledge of their natural capacity; this is, however, very different from the philosophical consideration of law. For the development from historical foundations ought not to be confounded with the philosophical development from the idea; and the historical explanation ought not to be extended into a justification which is lawful in itself; because a point of law may approve itself necessary under circumstances and times, and be perfectly well-founded and consecutive, and yet be in itself

unreasonable and unlawful. Philosophically to establish points of law, means, to prove from the idea that they are reasonable and lawful in themselves. If this distinction is not observed, the point of view will be displaced, and the inquiry after the true justification, according to the idea of reason, be transformed into one of justification from circumstances and consequences, which latter may possibly rest upon false foundations; and, in a word, the external phenomena be put in the place of the nature of the thing. It happens, besides, that, if the external origin has been confounded with the origin from the idea, the historical justification unconsciously brings about just the very contrary of what is intended.

If the origin of any institution is found to be perfectly suitable and necessary with regard to particular conditions, and the institution itself just what the historical point of view requires, it follows, if this is to be reckoned a sufficient justification of the thing itself, that exactly the contrary has been proved; that, because those circumstances do no longer exist, the institution has lost its meaning and propriety. It is only for political reasons, because, among others, rights once acquired must be protected by the state, that their continuance can be justified, although their unfitness for modern times may not be denied.

Besides this historico-philosophical disposition, these men ought to possess discretion, and a firm and upright character, though free from obstinacy and selfishness, so that they may not allow themselves to be determined by paltry or egotistical motives.

This assembly might, therefore, consist of, 1st. Sitting, or retired members of the highest courts of justice, men qualified by their position and occupation to become imbued with a clear and thorough knowledge of the whole subject, and thereby enabled to estimate the importance of an individual case, and its relation to the system in general.

2d. The most distinguished theoretical jurists, who are deeply versed in the science of the law, and philosophers, whose scientific minds can alone make the given materials fruitful, by developing their principles and the system according to which they should be arranged.

3d. The most approved practical lawyers, elected from the members of the courts of law and the body of advocates, and who might be looked upon as representatives from the commonwealth, from their having had occasion to observe more closely the wants of the citizens, and to collect a great amount of special experience; but who ought, besides, to possess a comprehensive knowledge of jurisprudence, in order to secure their being able to furnish valuable results of experience.

It may with certainty be recommended, as relates to the qualifications of the learned fellow-laborers, that they ought to be not only versed in the anglo-American law, but also in the Roman jurisprudence, and the philosophy of the science, because the American law sprang from the old English law, has derived many improvements in the last fifty years from the Roman code, and now requires a philosophical system and a precise definition of its principles.

At this place the remark will be highly satisfactory, that the ready zeal and the recent labors for the philosophy of law have already done much for the law, so that the moderns have acquired essential advantages over the ancients, and are capable of producing in the sphere of legislation, works which may far surpass those of their forefathers.

Let great care be shown in the election of the members of this assembly; for here it is not numbers, but talents, which obtain the palm.

We can, on no account, dispense with the good advice of our contemporaries and predecessors. That of the latter is contained in the sources of the law. That of the former

is the collective wisdom of the great men throughout the Union. And it must be manifestly desirable, not only from the power arising from the unity of the United States and the intricacies springing from the internal communication between the different states, but also from the circumstance that one state may not possess, in the resources of its own juriconsults, statesmen, and philosophers, a sufficiency of means for creating a perfect system of civil jurisprudence; that the code for each state should be compiled by the joint labors of the most eminent men of all the states of the Union.<sup>1</sup> The members of such a deliberative body might be appointed by the governor and senate of each state, in the same manner as the officers in the judiciary department of the United States are appointed by the president and senate, with these exceptions, that each state shall have the right of electing from another state any celebrated literary or scientific man, who might appear to them peculiarly fitted for this great business, and in order the more to guard against the effect of party spirit, I would propose that a convention for the nomination of candidates be composed of an equal number from each profession; for those persons best fitted for such an office generally have too much reservedness of manner, and have too little regard to popularity, to secure an election by universal suffrage. In regard to these appointments, we observe with the greatest satisfaction, the judicious selections of members which have been made to supply the bench of the supreme court, and which does honor to this country. By a similar means we hope to procure as able a selection to compose these important bodies. The debates in the senates of the different states, concerning the men to be appointed, should be public, because then we

<sup>1</sup> In England, France, and Germany, the people elect the members of their general legislative bodies indiscriminately from all districts of the country, and are not, as in the United States, confined to those residing in their own district.

shall also be able to distinguish the great minds, who will be zealous in their support of the worthy, whereas little minds will discover themselves by their envy and jealousy. By these deliberative bodies we should make the laws more reasonable, therefore more permanent and lasting. And the less the consequence of passion and party spirit, because, in this proposed assembly, the greater would be the weight of argument and knowledge of thorough lawyers, statesmen, and philosophers, and thus a remedy be provided against the serious evil which Kent mentions in his Commentaries on American Law, vol. i. p. 227 : — “ A mutable legislation is attended with a formidable train of mischiefs to the community. It weakens the force, and increases the intricacy of the law, hurts credit, lessens the value of property, and it is an infirmity very incident to a republican establishment, and has been a constant source of anxiety and concern to their most enlightened admirers. A disposition to multiply and to change laws upon the spur of the occasion, and to be making constant and restless experiments with the statute code, seems to be the natural disease of popular assemblies. In order, therefore, to counteract such a dangerous propensity, and to maintain a due portion of confidence in the government, and to insure its safety and character at home and abroad, it is requisite that another body of men, (the senate of the United States) coming likewise from the people, and equally responsible for their conduct, but resting on a more permanent basis, and constituted with stronger inducements to moderation in debate and to tenacity of purpose, should be placed as a check upon the intemperance of the more popular department.”

The codification should be entrusted to a union of lawyers, under the direction of a president, and not to a single individual, because the knowledge and experience, required for the suitable composition of the laws in the various departments of jurisprudence, are more extensive than could

possibly be united in one man, whilst their numbers would excite a more thorough examination and discussion, and prevent an obstinate adherence to extremes. A spirit of circumspection and a perfect knowledge of the extent of the subject which is to be entrusted to their skill, must guide the assembly, if its usefulness is to be certain and efficient.

The number of members in this assembly should be suited to the sphere of its activity.

In the assembly in question, the president should be entrusted with the drawing up of a plan for the whole subject, the management of the future discussions, and the final composition. It may be expected that the assembly itself would transfer the conduct of affairs to the ablest of their body, so that probably the most sagacious and talented men would be the soul of this assembly.

#### *Method of compilation.*

The president having, as aforesaid, the design and management of the whole under his charge, ought to prepare, after a simple and perspicuous plan, a draft of all the subjects that are to be discussed.

From this draft, each member would select those subjects most suited to his previous acquirements. Each would then give in his productions, in the exact style which they ought to have, if they were to be published. And moreover, though only for scientific purposes, an historical enumeration of all the fountains, and as perfect an account as possible, of the literature he had examined, with accurate quotations in order to keep the sources accessible; all which might be embodied in the form of notes beneath the text of the code. In this way the mass of the materials would be thoroughly and perfectly digested. In order not to lose sight of the necessary unity, these productions ought to be read aloud in the presence of all the members, and each should

pay strict attention to prevent any contradictions in the individual works. Partially or entirely unsuccessful productions should be prepared anew; in which latter case, several individuals might draw up the same law, each by himself, whereupon their drafts might be compared in session, be improved by selections from each, and by verbal and written amendments, and be united into one lucid whole.

It has been always observed in the verbal transactions of assemblies, as for instance, in congress, that many able men are frequently prevented from speaking by shyness, or other causes more respectable, although they may be in possession of the soundest views. The amount of their knowledge and experience is here almost withdrawn from the deliberations, and does not increase in the degree in which it might and should, the maturity of the measures which may be finally adopted. In order to meet this evil, the members of the proposed assembly ought to be permitted and encouraged to hand in written amendments, which probably would be frequently offered in this assembly, in which solidity would be more esteemed than pompous delivery.

The publicity of these sessions seems to be necessary, in order, that, on the one hand, a lively interest and a perfect confidence may be maintained among the people, from the conviction that the debates upon the civil jurisprudence are open to criticism, and that shame, that great protector of human liberty and the instrument by which publicity works with such irresistible power, is breaking down the selfishness, or obstinacy, or ignorance of the members;—and in order, that, on the other hand, those jurists who do not sit in this assembly may be prepared, by an attendance at these sessions, for future legislative activity.

The minutes of the proceedings ought, besides, to be made known through the press, so that the nature and ori-

gin of the new laws may be well understood, and an historical and literary interest, which would else be wanting, be impressed upon the laws and the jurisprudence.

And finally, all thoughts should be laid aside of wishing to finish so difficult a task in a few years; there is no reason for haste, and nothing did more injury to Justinian's code than the excessive precipitation with which it was compiled.

From this first attempt some perfection ought certainly to be expected, though not the highest. There has never yet been established, in any state, a single institution which offered at once the highest degree of perfection. How much less can such be expected at the first attempt at a system of legislation, which is to embrace the whole *jus privatum*, or municipal law of a state.

The whole American jurisprudence would acquire, from each good code, similar and even greater advantages than those which Blackstone procured by his work for the English law, which, before his time, was nearly incapable of being understood as a science, even though his work was not sanctioned by legal authority. But would any body seriously maintain that it had been better if Blackstone had not spread so much light and so many facilities over this intricate subject? To such facilities the code would superadd the influence of its legal authority, whilst anything faulty that might be found in it would be gradually amended by the codifying assembly, whose functions ought to continue, even after the completion of the code, as shall be more particularly dwelt upon in its proper place; and as there would be less business, there would be a proportionably less number retained.

After a code has received its final revision by the assembly, it will have to be printed and circulated throughout the states, in order to induce all thinking men to express, in the public papers, or by private letters, any doubts or objections which they may entertain. For it is due to the



dignity of those countries where law and liberty are respected, to consult with the people about the regulations by which they are to be bound ; and the more so as, by one unwise law, the happiness of a country may be disturbed.

Sufficient time having been granted to public opinion to express itself openly, before the final publication of the code, and the well-founded objections having been weighed and attended to by the assembly, the code would then be laid before the legislature of its state, for the ultimate scrutiny and ratification, where those wishes of the people, which, notwithstanding the right of petition to that assembly, might hitherto have been disregarded, and should approve themselves of weight, could obtain a hearing and a certain admission into the code. Whatever was introduced in this present stage, and might disturb the unity of the whole, ought to be introduced as an exception, and be designated as such.

*Of the necessity of a permanent assembly for the purpose of continually amending and remodelling the laws, according to the spirit of the times.*

Thus, finally, the code will have been digested. But we may not even then forget that the law necessarily progresses with man in the form of customs and statutes, in the way we have attempted to develop more at large in the preceding pages ; and that its meaning, which we described elsewhere as the reasonable at a certain stage of development, contains within itself the necessity of a continual advance, or retrogression.

What ought to be done at this point, with a full regard to the nature of law, can be alone acquired from the pages of history ; from which we learn, that the civil jurisprudence of the Romans owed its circumspect expansion, and a perfection that has never again been attained in any country, to the carefully united action of legislation and jurispru-

dence, which went on together with an equal step, and to the intimate alliance of theory and practice. The unparalleled development of the Roman civil jurisprudence rested mainly upon the ever united action of the prætors as administrators of the law in their edict, and of the Roman lawyers as representatives of the jurisprudence. The office of the prætor *urbanus* and *peregrinus* in Rome, and the edicts which they promulgated for the period of their term of office, one year, included within their objects the civil process and the whole civil jurisprudence. This system of edicts cannot be traced, in its origin, to any actual and real legislation, which from the very beginning had ever been an affair of the people, promulgated by its various legislative bodies;<sup>1</sup> but consisted in a declaration of the principles which the prætor intended to be guided by in the execution of his duties, and which acquired, in the following manner, their legal authority.

After Rome had extended her dominions over the greater part of the then known world, the relations of her citizens among themselves and with foreigners had become continually more intricate and varied, and new manners and customs had been introduced, the prætors were led — not, indeed, from any fixed plan, but rather from the necessity which lay in the altered state of the times and the enlarged circle of communication — to alter and continually to amend the regulations of the civil law, always, however, with regard to the spirit of the times. In the expansion of the law, nevertheless, the prætors were forced, by the disposition of the Roman jurists — which strongly held to all that had descended from former times — to keep always before their eyes the leading fundamental principles of the then existing law, and not to hurt or destroy any portion of it by violence. The intention of the edict, according to the

<sup>1</sup> Thus the senate promulgated the *senatus consulta*, and the plebeians in their comitia, the *plebiscita*.

Roman expression, was *adjuvare, supplere, et corrigere*.<sup>1</sup> In this system of perfecting the law, those principles which had approved themselves as sound were invariably retained as guiding points, around which the new and necessary laws were arranged as supplementary. A certain unity and sequence were hence necessarily introduced into the law by this procedure.

Doubts may, however, be raised as to the intrinsic merits of those ancient fundamental law-principles; to which the obvious answer is, that they were good, at least, according to Roman views. More cannot be demanded from any practical system of jurisprudence, than its harmony with the degree of the expanded reason of that time, and never, an absolute perfection; that is to say, a divine, and not a human perfection.

That the ancient fundamental law-principles, which the prætors regarded as the foundation of the whole Roman jurisprudence, were sound, at least, according to Roman notions, I shall endeavor to expose in the following few remarks. The leading fundamental principles of the Roman jurisprudence, were contained in the twelve tables, of which we unhappily possess only a few mutilated fragments, which have been handed down to us by different authors, so that it is impossible to judge fully of their internal merits.<sup>2</sup>

<sup>1</sup> D. 1. 1. 7.

<sup>2</sup> The principal genuine fragments of them are found in Cicero's works, particularly in "*De legibus*," in the writings of the older Pliny, in Gaius's writings on the twelve tables: Gaii Inst. I. § 111. 122. 132. 145. 155. 157. II. § 42. 45. 47. 49. 54. 64. 224. III. § 9. 11. 17-19. 21. 23. 40. 46. 49. 51. 78. 82. 189. 190-194. 223. IV. § 11. 21. 24. 28. 76. 79. Gaius, in his commentaries on the twelve tables, wrote, not twelve, but six books, and it seems that always two of those tables belong together, according to the opinion of Prof. Dirksen, of Berlin, in the digests of the "*Corpus juris civilis*," pr. ex. lex. 1., Dig. de orig. jur. lib. 1. tit. 2, and lex. 43., Dig. ad leg. Iul. de adult. lib. 48. tit. 5; in the works of Gellius and Festus. Amongst

With the history of their birth, on the other hand, we are better acquainted, and know that the first ten tables were drawn up, during the first decemvirate, by patricians alone. Although plebeians composed the half of the second decemvirate which promulgated the two last tables, it cannot have been very difficult to obtain their consent to any measures supported by the firm and united patricians; as it was necessary to win over one of the plebeians, in a college where every thing was decided by the majority, and where the equality of the new men (*novi homines*) could with difficulty be insisted on, with those who had filled the highest offices, the more so, as publicity was not allowed, which might have furnished them with the force of public opinion. The first foundation, however, and the direction of the whole work, originated entirely with the patricians.

But it was the common law of the different classes and of the whole people, which was to be laid down in the code; and as this was done first by the members alone, and afterwards with the superior weight of one class, it seemed hardly possible not to expect great partiality; and indeed the old privileges of the patricians were more secured by

the attempts to restore the twelve tables to their original order, from the fragments, those of Jacob Gothofred, in his "Quatuor fontes," Genev. 1653, pp. 1-264, and the other attempt of Prof. Dirksen, at Berlin, in his Uebersicht der Versuche zur Kritik und Herstellung der Zuelf-Tafel-Gesetze, Leipzig, 1824, are the most eminent. The great difference in the results of these attempts shows the impossibility of fully effecting that object. For farther reference, I would mention the following works upon the subject. Haubold, Inst. Lit. p. 304-306; Loccella, tria tentamina ad illustr. leg. XII tabul. Vien. 1754; Leggi delle dodici tavole esaminate secondo i fundamenti e le regole della politica da Ludovico Valeriani. Mil. 1802. Zell, Leg. XII tab. frag. cum variar. lect. delectu paraph. et indicatis sing. frag. fontibus, Freiburg, 1826. Schirmer de tribunicie pot. origine ejusque ad XII tab. leges frag. Comm. 1826. Hugo civil. Magazin, Band IV. p. 462. Savigny's Zeitschrift, Band I. No. XVII. Neibuhr's Rom. History, pp. 46, 67, 107, and II. p. 109. Fragmenta XII tab. ex restitut. Jac. Gothofredi notis illustrata a Ch. Hoffman in Historia jur. Rom. vol. II. part 1. pp. 129-304.

writing than reformed; yet we may with certainty conclude that the fundamental principles, as regards the civil law, laid down in the code, must have been suited to the peculiar spirit of the Roman people, since we find that people assenting to and retaining the twelve tables, although they banished the authors of them. It is moreover worthy of notice, that Cicero, Tacitus, and Livy, who were acquainted with their contents, judged most favorably of their merits.<sup>1</sup> The precise brevity of their general principles may be concluded from the circumstance of Cicero's having learned them by heart, in early youth;<sup>2</sup> and it is this precise brevity which probably assisted most materially in establishing the twelve tables as the proper and general foundation of jurisprudence.

The prætors were mindful of the twelve tables, and were assiduous in protecting ancient customs, without, however, looking upon them as invincible barriers to the establishment of any new views which might have sprung up among the people.

The edict owed a great part of its beneficial action to the practice invariably observed by the prætors, of laying down in it beforehand the principles by which they intended to be guided, so that sudden and arbitrary decisions were rendered difficult of introduction into this growing system of laws; whilst, on the other hand, those principles were regarded as laws on trial for the space of a year (*leges annuæ*, as Cicero describes them,) which the succeeding prætor might retain if he found them of good import, or reject, if otherwise. If, in this way, the principles were estab-

<sup>1</sup> Cicero de Orat. l. 44. Fremant omnes licet. dicam quod sentio: bibliothecas mehercule omnium philosophorum unus mihi videtur XII tabb. tabellus, si quis legum fontes et capita viderit, et auctoritatis pondere et utilitatis ubertate superare, etc. But he declares that the two last tables contained *jus unigenum*. De republ. II. 37. Tacitus An. III. 27. and Livy III. 34.

<sup>2</sup> Cicero de legibus, lib. II.

lished into enduring laws (*edictum translatitium*), from the succeeding prætors having approved and acted upon them, and from their having been silently accepted by the jurists, they could not — from the general position of the prætors, whose edicts and proceedings were subjected to public criticism in the public courts — but be the result of the opinions of equitable and justly reasoning men, and must have been suited to the reigning opinions and the demands of that particular period.

In that manner the edicts, proceeding from small beginnings, grew into a completeness which embraced nearly the whole system of jurisprudence.

This constant working at the several parts of the Roman jurisprudence, which has advanced with such caution and such invariable regard to the leading fundamental principles ; the precise and clearly defined character of these principles, which gave such an enviable and thorough command over these materials to the great jurisconsults of the second and third centuries after Christ, so that they were able to calculate, as it were, with principles, and to handle theory and practice with equal facility, and thus raise the Roman jurisprudence to its most brilliant epoch, — in short, that perfection of the law at this glorious period of its prime, which fills us with such admiration, seems to have been chiefly owing to that peculiar legislative activity of the prætors as well as to the coöperating and influencing activity of the jurisconsults.

The manner in which the prætors amended the laws was influenced and restrained by the jurists, as the guardians of the ancient forms of the law ; whilst the characteristic disposition of the later jurists, which was so favorable to the organic development of jurisprudence, seems to have been principally formed and preserved by the carefully progressing edict. The edict of the prætors, therefore, justly

deserves, from its great efficiency, this beautiful denomination —

“Viva vox juris civilis.”<sup>1</sup>

From the period of the later Roman emperors until our own times, there has never been such a union between legislation and jurisprudence, nor did there exist throughout those many centuries so well regulated a system for continually improving the jurisprudence, so that a considerable period frequently elapsed during which little was done for the law, and then some sudden legislative act appeared, and too much was done. The one was as hurtful as the other. For nature will not endure stops and jumps, nor will the life and the law of man endure them, for both are subject to general laws of nature. But every thing contrary to nature must necessarily produce injurious consequences from the invariable laws of nature. Hence it was, from an internal necessity, that the above described faulty condition of the laws arose. From history, on the other hand, we learn that the law, which, from its nature, is ever growing, can only be maintained for the future in a healthy life and condition, by the reciprocal assistance derived from the union of the science of law with the making of law. It will not therefore excite surprise, if I take upon myself to point out the means of bringing about a good condition of the law from the existing relations of the states.

It has already been suggested, that a permanency ought to be given to the influence of this assembly, and accordingly I would now propose, that of those who have been engaged in the compilation of a code, a smaller number should be retained for the exclusive purpose of adjusting, controlling, and providing for, as circumstances may require, the administration and the development of the law; (always

<sup>1</sup> D. 1. 1. 8.

under the final superintendence of the different states and their legislative assemblies). This body should, moreover, be especially empowered (for settling controversies and removing defects in the new code, and also in the law continually evolved,) to prepare, revise, and arrange yearly the new statutes for the legislatures, so as to assume additions or supplements into the code, and to give greater certainty to everything found good in the common law. From time to time, therefore, newly systematized editions of the code will be necessary. As, however, precedent holds so important a place in determining and establishing laws, and as precedent depends upon judicial decisions, it should be required of all judges who may determine in cases of difficulty, to send in their decisions and the reasons for them, to the proposed assembly, to be by them digested and provided for in future, by the authority of the legislature. In this way only will unity of system be secured; for, otherwise, there would be two sources of laws — the legislature and the courts. In the plan now offered, both are united and properly influenced through this scientific medium, by which both communicate with one another, and which, from its nature and office, can give more freedom and leisure of mind for the comprehensive labor of controlling and digesting the whole system of law.<sup>1</sup> And every citizen should be allowed to address remonstrances upon those points which appear hurtful and faulty, in the same way as the right of petition allows each citizen to present petitions to the legislature. For the most comprehensive investigation of individual points is, it is well known, brought about by real cases, from the urgent necessity of carefully considering such cases from all sides. The assembly ought in no wise to rest satisfied with the partial representation made

<sup>1</sup> This plan I have already proposed in an essay: "Ueber Verbesserung des Rechtszustandes in den Deutschen Staaten," in 1835, page 65-74.



by judges and private individuals, but should look into the matter at issue, and obtain, by inquiries and reports, the means of thoroughly sifting the doubtful questions. In this way, every citizen would have an opportunity, and might reasonably hope to do something towards the further improvement of these great national works.

At the same time, it would be of the highest importance for the lawyers of those states, that thereafter they would have but one and the same object for their scientific labors, and could mutually assist each other, by public communications of their experience in advancing the law towards its highest stage of perfection.

All that has been said in the preceding pages on the assembly for the first compilation of the code, applies with equal force to the permanent assembly, which will realize the ends of its establishment in continually promoting and amending the municipal law. The following remarks will include everything of an especial reference to the permanent assembly.

This assembly should stand under the direct control of its state, be annually called together, continue in session for some precise period, and receive a suitable and fixed salary from the public treasury; their salary would be but a trifle, compared with the benefit derived from the clearness and perspicuity introduced into the law; and would, probably, from its constitution, be able to prepare most thoroughly the laws for the after deliberations of the legislature of its state.

By the action of this permanent assembly, the unity of the jurisprudence would forever remain unimpaired, because the leading fundamental principles of the law of all the states were originally drawn from the fountains of the common law, and might be easily preserved and united, after having been once clearly and systematically laid down, in the several state codes. If the true value of

the Roman jurisprudence is rightly supposed to consist in the facility with which the Roman jurists turned from theory to practice and from practice to theory, we may hope to procure for our legal development the same peculiarities and the same stirring life, so soon as the above assembly, constituted after the proposed plan, shall have acted a sufficient length of time. For in the same way as the Roman law and the edicts at the time of the great jurists owed their unequalled perfection to the circumstance, that the jurists at Rome possessed a common centre in the publicity of the law-courts and in the practical spirit engendered by the annual changes of the prætors, who were elected from among themselves, and that they possessed, as the result of both, a lasting means of applying their science to the sphere of legislation or of practice. So in these present times, a new life might be infused into the development of American jurisprudence by the establishment of such an assembly, which would render it possible to treat the science more practically, and the practice more scientifically. In this way, the jurists would indeed obtain, what they never before had, a well-founded science of law, while distinguished and talented men would apply themselves with heart and soul to the study of jurisprudence, because their vocation would be rich in really scientific and practical investigations, and be highly salutary to the whole state.

Assemblies of this nature ought to be permanently engaged with the civil jurisprudence; and, in order that the whole body of the law may at all times be easily controlled, should provide for the proper and systematic ordering and intermingling of ancient and modern laws, together with a constant and exact account of all the changes which may have been effected in the ancient system by modern innovations. In this way, besides the essential points of an amendment of the positive law, attention might be safely bestowed on that great desire after more easy means of

mastering the law, which had shown itself in so many places, and was one of the chief causes of the demand after new and well-ordered codes. These would be the beneficial effects of the adoption of this plan, which would not only apply to these present times, but extend also their influence throughout future centuries, and materially assist the foundation of the fortunes of these states.

If, on the other hand, it should be maintained that attempts should not be made at amending the condition of the law by the lasting union of jurisprudence and legislation, which would advance the law to a high degree of perfection, until jurisprudence and legislation had each attained their highest perfection, it would signify nearly as much as that a person ought not to go into the water until he is able to swim.

A more important objection to my plan might seem to be contained in the following argument ; which, however, on impartial investigation, will be found of little weight.

Among other privileges, it is well known that the change of the municipal law, *jus privatum*, has been reserved to the legislatures of the different states. This change is not only one of their duties, but also one of their rights. It might now appear, that this right would be encroached upon by my proposition, but this is far from being my intention, and I am only anxious to see the assembly which I have proposed take the place of those committees, which are generally appointed for the purpose of preparing the drafts of laws, and assume first the compilation of a code, and afterwards the continued amendment and advancement of the municipal law. The labors of this assembly would likewise serve only as preliminaries for the good of the legislatures, on whose deliberations and decisions it would depend, whether and with what modifications their labors should be assented to. This I had already in part adverted to, when I remarked that the composition and

adoption of a code would mainly depend upon the free will of the state legislatures.

The constitution of the proposed assembly, which, according to this plan, should be permanently engaged with the healthy development of the law, would produce the beneficial effect of preventing that hurtful stagnation and too rapid alteration which have hitherto marked the advancement of legislation. This great advantage, it is manifest, cannot be attained by committees of the legislatures appointed for separate questions, for the very simple reason that those committees are not permanently engaged after a fixed plan, but only on separate detached points, and that they do not always consist of the best lawyers and scientific men.

This more favorable form of the proposed body, however, must be animated by a vigorous and keen spirit, to ensure which I was induced, in some of the preceding pages, to dwell on the kind of men, who ought to be assembled in order to perform satisfactorily one of the most holy duties of the people.

The legislatures, whose interest it would manifestly be to stand in the same relations with the assembly, which had already subsisted between them and the usual committees on the law, and whose right, with regard to the drawing up of the propositions for the code and law, ought not to be diminished in any way, should have the privilege of electing the members of this assembly, as before mentioned.

The influence which the legislatures have hitherto exerted, would thus continue undiminished, while the exercise of only one of their rights with regard to legislation in the sphere of the municipal law would be regulated more usefully for themselves and with more salutary effect for the nature of the law.

The efficacy and the rights of the legislatures, in questions of administration and state polity, as well as their

other immunities, would continue unchanged, since it would be nothing more than the preparation for legislation in the sphere of the municipal law, which ought to be transferred to the assembly.

I said, that the operations of the assembly would be useful to the legislatures themselves ; the proof of this assertion may be demanded of me, and I shall hope to establish it by the following argument.

A legislature must not and ought not to be composed of lawyers alone. Solid legal acquirements, however, are required for the certain and perfect disposal of questions appertaining to jurisprudence. Many of the nonjurists are frequently embarrassed about voting according to their conscience, even with yes or no, upon purely legal points, as they are unable fully to judge of the purport and entire meaning of those questions.

If now a legislature is to be really effective, as regards the whole law, it must be presupposed that all its members are thoroughly versed in the doctrines of jurisprudence, and their historical development ; this, however, can never be the case with the legislatures, from their peculiar and very dissimilar mode of construction. For this reason, no certain expansion and perfection of the law can be expected through their means alone.

The questions, moreover, relating to the administration of the country, crowd so upon one another, and from their pressing nature demand so imperatively the action and attention of the legislatures, that the attention to purely legal questions must often be put off, from one session to another, unless the legislatures were retained together for a longer period, so as to afford the necessary time for their discussion and decision.

But the members have seldom been able to devote the whole of their time to legislation alone, and have generally had other affairs to attend to, so that, after the despatch of

the most important points, they have ever willingly deferred the purely legal matters.

If, now, the legislatures get the drafts for those legal matters thoroughly prepared by the proposed assembly, their future deliberations upon them would be sooner matured, and offer at the same time the great advantage, that partiality would in a great measure be avoided, and that the wishes of the people would be introduced into those drafts.

The proposed assembly would be, in a word, nothing more than a union of learned men for the attainment of a great scientific object, and, as such, should not have any legal authority, except the authority of its arguments and of truth. The legal authority, or the power of making into laws the previous labors of this assembly, ought to remain unchanged and undiminished in the hands of the legislatures. It would thus happen, that jurisprudence and legislative authority would be united peaceably and firmly, and mutually assist each other.

This coöperation would be salutary, peaceful, and harmonious, and each part would gain additional strength from the union; jurisprudence alone, and left in the position it has hitherto occupied, is seldom able to introduce its truths into practical life, without this internal connection with the legislative authority. The latter, on the other hand, obtains great advantages from the assistance of jurisprudence, from its thoroughly-digested drafts. Its true interests and its popularity depend greatly upon the finished perfection of its enactments; so that it will readily seek the support of jurisprudence.

In this way, each separate state might have such an assembly besides its own legislature. In order, however, that the power of the learned might not be too much dissipated, and that, in the development of the law of all the states, that so desirable harmony might in part be attained,

their separate assemblies should be put in connection with one another by the communication of their labors. As this might be effected by means of the press, there would be no great difficulties to be surmounted; and as the fundamental principles of the laws of all the states have originally flowed from the same fountains, the general development of jurisprudence, in harmony with the main points at least, would not be of such difficult attainment as might be supposed by those who are ignorant of their historical elements.

Not many will be found to deny the good results of such a coöperation of theory and practice, of such an union of jurisprudence and legislation. Obstructions and difficulties, notwithstanding, will be offered to its execution; these, however, in so far as they have been examined, do not exclude the possibility of being overcome.

*On a general code.*

In the United States, the diversities of climate, local relations, and institutions, must necessarily modify the particular laws of the codes of the several states of the union. But in consequence of the great intercourse between the different states, and their connection in such a variety of relations, upon which their rise and progress depend more than on foreign relations, laws of commerce, in order not to create difficulties and derangements, and injure their intercourse and credit, ought to be uniform. To this effect there might be a general code, on the same plan as that of the states, for the purpose of arranging the laws on those subjects, whose jurisdiction was granted to the general government by the constitution, art. 1. sec. 8. The remarks of judge Story, in his Commentaries on the Conflict of Laws, will fully prove the utility of such an arrangement, and I would request every reader to give this work an attentive perusal, for in this essay I can do no more than to give some hints of the principal subjects. Since, as it is well known, all

the states were first governed by English law, the bases of the different codes will all be similar and like pillars to the union, and the general code will be the keystone to the structure. Thus we shall have a practical realization of the maxim, "One empire, one law," and thereby draw still closer round the union the connecting bonds of love for a common country.

*Historical remarks concerning the formation of different codes.*

The opposers of these codes have attempted to predict, from their history and the errors which have attended those early attempts to systematize the law, that all future experiments of the kind will not be more successful. But these predictions are vain, unless it is proved that these experiments are contrary to the very nature of the law. But none of the opposers of codes have been able to prove, from the nature and spirit of the law, that it could not be comprehended in a systematic arrangement. And it would truly be very remarkable, if the law, which is itself destined to produce civil order, could not be conceived and expressed in any order. But opposers do not go so far as to assert this; their objections amount to this, that the spirit and connection of the law can very easily be marred in bringing it from its confused and disordered state to a regular, systematic form.

That, in this respect, great danger is to be apprehended, if such a work is too much hastened, or if entrusted to unskilful hands, is not to be denied, for the history of these codes too plainly shows it; but from that very history, it can also be shown that those errors can be avoided in new experiments, for it shows us particularly on this point, just what it does in general in regard to practical life—it teaches us more what faults we ought to avoid, than how we ought to make new experiments under the various cir-



cumstances and with different persons, rather leaving this to calculation. With the exception of the minor faults, there appears to be two great mistakes with regard to the treatment of the codes and the state of the law after their promulgation, which have prevented a more happy result. These are, 1st, nearly all former codes were compiled too hastily; and, 2dly, after their publication, they have been left too much to their own fate. Instead of which, this same body of men who compiled them should have been retained to defend them, and to harmonize them with the newly-made statutes and other difficulties. The fact of the first mistake will be seen from the historical remarks in some of the following pages. And that of the second also will be found in the following, together with the preceding chapters.

Here I would recall to the reader this general observation. In order that the state of the law in a country may be good, two things are necessary: a perfect science of law, and a good legislation. Neither can attain the highest degree of perfection without the coöperating excellence of the other, since each in its progress depends upon the assistance and material of the other. It is necessary for a good state of law, that the influence of both should be cotemporary and united. The truth of this principle, as shown above, has been proved in the development of the Roman law. I would here remind my readers, that the unequalled development of that law depended essentially upon the continually coöperating exertions of the prætors as legislators in their edict, and of the Roman jurists as representatives of the science of the law.

Because, from the time of the Roman emperors to the present day, such a coöperation of legislation and of the science of the law agreeable to its nature did not exist, in any state; often too little was done for a time, and then, again, too much at once, by hasty acts of legislation. The

one extreme was as detrimental as the other; for nature in general, and consequently the nature of the law, cannot endure this irregular progress; everything contrary to nature punishes itself.

I have fully shown what coöperation should exist between legislation and the science of law, in what I have said in the previous chapter, concerning the development of law after its promulgation. I now proceed to the history of the codes themselves. There are four codes, which stand eminent in the history of law in both the older and more modern European states, as the most elaborate and remarkable, namely, those of Rome, of Prussia, of Austria, and of France, which are particularly excellent for examples to us, since they are all comprehensive codes, and made for great realms; since the manner of their compilation has been very different; and, since the state of jurisprudence from which they emanated had great similarities and also dissimilarities. In considering these, I shall speak of them in the chronological order of their promulgation. First, I speak of the Roman code, the *Corpus juris civilis*.

### *The Roman Code.*

Previous to the compilation of the Roman law in its present form, by Justinian, the clear head of Julius Cæsar had originated the idea of a general code, which, with the hand of a true artist, he would have modelled as the purest monument of justice, had it not been for the death-blows of Brutus and Cassius. As we have remarked, the present Roman code owes its existence to the emperor Justinian. In order to estimate justly its merits and defects, we must briefly represent to ourselves the state of jurisprudence at that time.

Their most eminent jurists lived about the commencement of the third century after Christ, and jurisprudence was then at its highest point of cultivation. The writings

of these eminent men had been carefully preserved, and from them the law was continually extracted. But from the end of the third century to the reign of Justinian, 527—565, was a time of gradual decline; at this time the sources of the law consisted in classic writings and the almost innumerable constitutions of the emperors. Since these materials could no longer be controlled and governed, there arose, previous to that of Justinian, several compilations, as, the Perpetual edict, compiled by Salvius Julianus, and the *Codex Gregorianus*, *Hermogenianus*, and *Theodosianus*. The use only of the imperial constitutions had been rendered more easy by the latter three compilations; but the jurisprudence depended much more upon the writings of the jurists; and to procure all of these at that time without the art of printing was very difficult, and even for the majority of lawyers impossible. Then Justinian ordered his compilation, and it, as the first, contained the whole of the then practical Roman law, in that point far surpassing all previous compilations.

Justinian, in his compilation, did not intend to originate, but only to arrange the law in better form, externally. The principal matter arranged was the constitutions of the emperors and the writings of the jurists. The former were collected in that part of the code called *Codex* and *Novellæ*; the latter in that part called *Digestæ*, or *Pandectæ* — the *Institutiones* composing the introduction to the whole work. The *Corpus Juris* consists of four parts: I. *Institutiones*; II. *Digesta*; III. *Codex*; IV. *Novellæ*.

This arrangement of the law according to its sources, retaining the original language, has been very important in preserving the true Roman law. For in this arrangement we can very easily separate the better principles of the law contained in the digests from the generally less valuable principles of the imperial constitutions.

The digests arranged in the following order the writings of the jurists: I. On the civil law, properly so called; II. On the edict of the prætors; and, III. On the practice of the law.<sup>1</sup>

The writings of thirty-nine jurists, contained in two thousand volumes, are here reduced and combined into one.

The object of the compilation was the practical law; the useless portion being thrown away, the whole historical development being retained for the better application of the principles, since all practical law has been given historically. This constitutes the superiority of that code above all others. There had been collected all the best manuscripts of that time, and a prudent and wise selection had been made, which preserved the true spirit and character of the Roman law. Thus a true, consistent, and complete set of principles, derived from the various sources, without inquiring the originals, has been arranged in this compilation of Justinian, nearly all obsolete peculiarities omitted, and so much of the *jus gentium* (which had gradually increased with the increase of the Roman empire) adopted, that it was by all these qualifications most fitted for all the different countries within the Roman jurisdiction at that time, as well as for use in modern Europe.

Such a production, at that period of decline, is only to be accounted for by the peculiar abilities of the compilers. The direction of the whole work was entrusted by Justinian to Tribonian, a man, who, in his enlarged mind, contained all the science of his time. He was assisted too by professors and advocates, scientific and practical men.<sup>2</sup>

Notwithstanding the great merit of this work, opposers

<sup>1</sup> Blume über die Ordnung der Fragmente in der Pandecten, in V. Savigny's Zeitschrift. N. 6, pp. 257—472.

<sup>2</sup> He was assisted by four professors and twelve advocates in the Digests; by dignitaries in the first Codex, and in the Institutes by two professors.

have regarded it as one cause of the loss of the genuine sources, whereas it has been the means of preserving at least what still remains.

Still, if, in the work as a whole, small defects are of little moment, we must remark, that the few contradictions and repetitions, which are found in it, are owing to the haste with which the work was accomplished, a circumstance which could have been very well avoided.

The first draft of the Code was accomplished in one year, A. D. 529; the Digests in three years, A. D. 533; and since the first edition of the Code of the constitutions was found too defective, it was made anew, and accomplished in one year, together with the Institutions, A. D. 534, and the whole was consequently completed in the short space of five years. The *Novellæ* (later constitutions issued gradually,) were added to the main work at a later period. It is probable, that, if they had not so hastened this great work, but had given a few years more to it, they would have avoided even these little defects. The "*Nonum prematur in annum*" ought not to be forgotten here, in this most difficult of all works — lawgiving. After the promulgation of this code, there were no prætors, as formerly, to develop the law consistently with the code during the following centuries. But the emperors, having the sole legislative power, by contradictory decrees, produced a most disastrous uncertainty in the law, and, by want of consistency, destroyed much of its harmonious structure.

The spirit of the Roman law was worthy of the best form; its merits are consistency and mathematical accuracy, which are due to the genius of the Roman jurists, and to their peculiar tendency of educating men to the law by addressing continually their reason and morality. In modern times, statutes are often in direct contradiction with morals. Among the Romans, law and morality were in the greatest harmony. Consequently, their government

and laws were inscribed indelibly in the souls of the citizens.

### *The Prussian Code.*

This system, in common with the Austrian and French, has the Roman law as its basis, which had been reduced and combined, with the local laws of the previous centuries, into one promiscuous mass, together with a great number of new statutes. To bring order and system out of this mass, was the intention of each code. The time of their compilation was not far different. The first impulse was given to the Prussian code in the year 1746, by Frederick the Great; to the Austrian code by Maria Theresa and the intelligent Joseph II., in 1767; and under Napoleon was made the Code Napoleon, from 1803 to 1807. The rulers who favored these codes may be counted undoubtedly among the greatest and most intelligent of modern times.

These codes, (all of which are now in use,) although of course they require the study of the sources from which they have been derived, have rendered the whole law much more easy and clear.

The Prussian code was compiled in the following manner: <sup>1</sup> It should contain according to the plan the whole of the practical law of the kingdom, yet the local laws of the several provinces remain in force, to arrange the existing law, embodying with it some additions, and without any unnecessary haste. Suaretz, a very talented man, gave to the whole work its plan and consistency, in which he was assisted by the most able and learned men of Germany, in the following manner: A plan was first made and published, which was offered for criticism to all the learned

<sup>1</sup> Bericht von Simon über Redaction der Materialien der Preussischen Gesetzgebung, in *Mathis juristischer Monatschrift*. Band 11. Heft. 3. page 191—286.

men, statesmen, and jurists of the whole German nation;<sup>1</sup> prizes were offered for the best remarks, which were furnished very abundantly by the German universities, which are combinations of professional schools of theology, jurisprudence, medicine, and philosophy. By this means, after it had been thus before the enlightened public, and had been repeatedly considered, it was finally published in 1791. This method of procedure would be advisable in this country, in bringing such a work to the highest state of perfection.

### *The Austrian Code.*

The compilers of this code were ordered<sup>2</sup> not to confine themselves to the Roman law and the existing local laws, but in every point to follow the dictates of equity and reasonableness. The basis of this code was, after all, the Roman law, and the commentaries on it, contained in eight thick folio volumes. It was finished in 1767. From this Herten made an extract, which was prepared for the code by Martini. This code was then published, and communicated to the Austrian courts of justice, and universities, for their examination. After their criticisms, the work was again reconsidered, and then published as a code. They did not take advantage of the literature and science of the German universities, and learned men in general, in this business, as the Prussians did, and they thereby lost a very valuable coöperative influence, which was owing to the small degree of in-

<sup>1</sup> Prussia, though entirely independent in its state organization, and though sustaining its own individual relations with the other powers of Europe, still having a German people, and situated in the midst of Germans, takes its part in all matters affecting the general interests of Germany, and is one of the most eminent members of the German confederacy. The same may be equally said of Austria.

<sup>2</sup> Zeiller's *Vorbereitung zur neuesten Oestreichischen Gesetzkunde*. Wien und Triest, 1810. Band 1. Page 19—30.

tercourse between the learned men of the different provinces. It is certainly improper, intentionally, to neglect to hear the opinion of the most able men of the time. Thus the work, which, to have been perfect, should have occupied the scientific men of the whole nation, was accomplished by the state in its own isolated character. The isolation of the state diminishes the possibility of an entirely satisfactory result of any general enterprise. Therefore the code formed under these circumstances was far less favorable than it otherwise would have been; but yet it must be acknowledged, that the code possessed great merit for the clearness with which it has given the general principles and rules, although it needs more precision.

### *The French Code.*

At the compilation of this code, several circumstances conspired to prevent it from being as good as might have been expected. The knowledge of the law at that time stood at no very high eminence, since all attention was drawn towards politics, and very seldom towards the investigation of science. And, unhappily, those four lawyers to whom Napoleon entrusted the fabrication of the work, were particularly deficient in a knowledge of the Roman law, which, with the customs (*coutumes*), formed the source from which the code derived much. But those men, among whom Portalis, Bigot-Preameneu, and Maleville were more eminent, possessed much talent. Another disadvantageous circumstance was, that they hastened their work too much.

The revolution had destroyed also, with the old government, a great part of the civil law, and new rules had taken its place, which, with what remained, required to be reduced and combined into one harmonious whole. This would have required the most thorough and accurate labor of years to prepare a work that should comprise the whole



civil law for a great realm. Instead of which, they were obliged to hasten it, in order to heal, in that point, the wounds of the revolution as soon as possible.

The plan of the code was very briefly sketched, and in a few months communicated to the highest courts of justice, for their criticism; then amended in the council of state, and immediately laid before the *tribunate*. This body was justly severe in its criticisms, blaming and rejecting some parts of it; the draft was then withdrawn, and the opposing members were removed, and new ones placed in their stead.

In this purified tribunate, preliminary discussions were held, in which their opinions and wishes were considered, and in the sessions of the years 1803-4, praises only of the drafts were heard. All parts of it passed, and received the name "Code Civil des Français."<sup>1</sup>

When, at a later period, the republic was transformed to a monarchy, many things were accordingly altered in the code; and it received, in 1807, the name "Code Napoleon."

That, according to the history of its compilation, the code could not be perfect in its contents is evident; and since it introduced, in such an imperfect manner, in part, the new law, it brought lawyers into many difficulties in trying to apply it, still the better parts of it deserve praise for their clearness. It is to be regretted, that the force and learning of a Montesquieu could not have given soul and consistency to the whole work, and his peculiar precision to its outward form. Then, indeed, would a work have been obtained which would have satisfied the demands of the nation and restored its equilibrium.

<sup>1</sup> All these discussions are printed in *Conference du code civil avec la discussion . . . du conseil d'etat et du tribunat*. Paris. Didot, 1805. 8 vols. in 12. *Code civil suivi de l'expose des motifs*. Paris: Didot, 1804. *Analyse des observations des tribunaux et de tribunal de cassation sur le projet de code civil*. Paris, 1802. Maleville, *analyse raisonnee de la discussions du code civil*. Paris, 1807.

*Conclusion.*

Now that we have exhibited, openly and impartially, the merits and defects of these four codes, we must declare our conviction that the errors, which have been committed in their construction, do not exclude the possibility of a better procedure and more satisfactory result. It is possible to avoid these faults by adopting only what has been good in former experiments; and, for the rest, making the proper attempts to improve and complete them. We may here very properly apply, in conclusion, the words of Schiller on the legislation of Lycurgus, (*Works*, vol. xvi. p. 114). "Although the first experiment has proved defective, it must still be always remarkable to a philosophical inquirer into the history of mankind. It is a grand movement of the human spirit to treat that as an art which had before been left to accident and passion. The first step in the most difficult of arts must necessarily be imperfect, but it is always valuable, because at the same time made in the most valuable of all arts. The sculptors began with 'Hermes's columns,' until they could rise to the perfect forms of an Antinous or an Apollo of the Vatican. The lawgiver must practise long in rough experiments, until, at last, the happy harmony of the social elements starts forth full formed. The stone suffers patiently the progress of the forming chisel, and the strings which the artist touches answer without resisting his fingers. The lawgiver alone labors on a self-acting, obstinate material; the human freedom will permit him only imperfectly to realize the ideal, which he may have entertained never so clearly in his own brain. But here the mere attempt deserves all praise, if undertaken with disinterested benevolence, and presented with consistent moderation."

ART. III.—THE INTERNATIONAL LAW OF THE SLAVE TRADE,  
AND THE MARITIME RIGHT OF SEARCH.

[From the *Law Magazine*, for August, 1841.]

THE prize law looks primarily to violations of belligerent rights as grounds of confiscation, in respect of vessels not actually belonging to the enemy; yet any trade contrary to the general law of nations, although not tending to, or accompanied with, any infraction of the belligerent rights of that country whose tribunals are called upon to consider it, may subject the vessel employed in that trade to confiscation. Thus, in the case of the *Amedie*,<sup>1</sup> which was that of an American (neutral) ship employed in the slave trade at the time of capture, sir William Grant, M. R., said:

“In all former cases of this kind, which have come before this court, the slave trade was liable to considerations very different from those which belong to it now. It had, at that time, been prohibited (as far as respected carrying slaves to the colonies of foreign nations) by America; but by our own laws it was still allowed. It appeared to us, therefore, difficult to consider the prohibitory law of America in any other light than as one of those municipal regulations of a foreign state of which this court could not take any cognizance. But by the alteration which has since taken place, the question stands on different grounds, and is open to the application of very different principles. The slave trade has since been totally abolished by this country, and our legislature has pronounced it to be contrary to the principles of justice and humanity. Whatever we might think as individuals before, we could not, sitting as judges in a British court of justice, regard the trade in that light, while our own laws permitted it. But we can now assert that this trade cannot, abstractedly speaking, have a legitimate exist-

<sup>1</sup> 1 Dodson, 84, note; and 1 Acton, 240; 2 Acton, 1, 4, 6.

ence. When I say abstractedly speaking, I mean that this country has no right to control any foreign legislature that may think fit to dissent from this doctrine, and to permit to its own subjects the prosecution of this trade, but we have now a right to affirm that *primâ facie* the trade is illegal, and thus to throw on claimants the burthen of proof, that, with respect to them, by the authority of their own laws, it is otherwise. As the case now stands, we think we are entitled to say, that a claimant can have no right, upon the principles of universal law, to claim the restitution, in a prize court, of human beings carried as his slaves. He must show some right that has been violated by the capture, some property of which he has been deprived, and to which he ought to be restored. In this case, the laws of the claimant's country allow of no right of property, such as he claims. There can therefore be no right of restitution."

It matters not in what stage of the trade the ship is captured, whether in the inception, prosecution, or consummation;<sup>1</sup> and the court will narrowly examine into the title of the ship; and where the colorable owner of the ship is the asserted owner of the cargo, its confiscation will follow the fate of the ship, with which it is involved in one common fraud.<sup>2</sup> But in the absence of collusion, the courts of this country will respect the property of foreigners, engaged in the slave trade under the sanction of their own country; and an indorsement upon the pass, signed by the foreign colonial governor, that "the vessel was bound to the coast of Guinea for slaves," raises a presumption of the foreign legality of the trade, and shifts the burthen of proof from the claimant to the captor.<sup>3</sup>

The instructions, annexed to the convention with Portu-

<sup>1</sup> 1 Dodson, 86; Stewart, 264.

<sup>2</sup> 1 Dodson, 91; à *fortiori* where the cargo belongs to the concealed owner, Stewart, 205.

<sup>3</sup> 1 Dodson, 95.

gal, embodied in 5 Geo. IV. c. 113, imply that the seizures of Portuguese slave ships are to be made under the personal direction of the commander of a ship of war. Therefore a seizure by an open boat (the crew of which was borne on the books of a king's ship) commanded by an officer of the rank required to make the search, but actually putting off from an unauthorized tender, and at a distance of fifteen hundred miles from the king's ship, did not entitle the ship to the moiety of the proceeds, or to the bounties under 5 Geo. IV. c. 113, §§ 67, 68, although the slave ship had been condemned by the competent court as a prize to a tender to a king's ship.<sup>1</sup>

The slave trade is not piracy,<sup>2</sup> nor any crime, by the universal law of nations; and therefore a French ship, employed in the slave trade before there was an actual abolition of that trade by the French law, might forcibly resist the search of our king's cruizers; for the rights of foreigners are not affected by British acts of parliament, or any commission founded on them, if inconsistent with the law of nations;<sup>3</sup> and a foreigner, not prohibited from carrying on the slave trade by the laws of his own country, may, in a British court of justice, recover damages sustained by him in respect of the wrongful seizure by a British subject of a cargo of slaves, on board of a ship then employed by him in carrying on the African slave trade.<sup>4</sup> But a claim founded on any act, which in the general estimation of mankind is held to be illegal and immoral, as piracy, may be rejected in any court on that ground alone: its general injustice may be subject of cognizance in any municipal court.<sup>5</sup>

Foreign slave vessels cannot be detained or searched at

<sup>1</sup> 2 Haggard, 366.

<sup>2</sup> It is made so in a British subject by 5 Geo. IV. cc. 17 and 113.

<sup>3</sup> 2 Dodson, 210, 238; 1 Haggard, 265.

<sup>4</sup> 3 Barn. & Ald. 353.

<sup>5</sup> 1 Dodson, 100.

sea except for violation of treaty, and then only by such of her majesty's ships of war as are provided with special instructions for that purpose; nor can the search of any such foreign slave vessel be made by any officer holding a rank inferior to that of lieutenant in the navy of Great Britain. With respect to these seizures of foreign slave vessels, the admiralty courts have no jurisdiction. The only tribunals which can legally adjudicate thereon, are the "Mixed Commission Courts," established in pursuance of treaties with certain foreign powers. An exception has been made by the statute 2 & 3 Vict. c. 73, in the case of Portuguese slave traders and such as are not entitled to the flag of any state. These are placed within the jurisdiction of the admiralty courts, like British-owned ships found engaged in the slave trade. When a vessel engaged in the slave trade is seized for a violation of the municipal law of the United Kingdom of Great Britain and Ireland, it is the duty of the captor to send her with the slaves on board (if any) for the purpose of adjudication to the nearest and most convenient port in any colony or settlement, where there is a vice-admiralty court.<sup>1</sup>

In the famous case of the *Maria*,<sup>2</sup> lord Stowell laid down the following, among other, principles of the law of nations, as incontrovertible:

"3dly. That the penalty for the violent contravention of this right of search is the confiscation of the property, so withheld from visitation and search. For the proof of this, I need only refer to Vattel, one of the most correct, and certainly not the least indulgent, of modern professors of public law. In book III, c. vii, s. 114, he expresses himself thus: 'On ne peut empêcher le transport des effets de contrebande, si l'on ne visite pas les vaisseaux neutres, que l'on rencontre

<sup>1</sup> Rules and Regulations, s. 25, under 2 Will. IV. c. 51; and see 5 Geo. IV. c. 113.

<sup>2</sup> 1 Rob. 340, affirmed on appeal, 4 Rob. 410.

en mer. 'On est donc en droit de les visiter. Quelques nations puissantes ont refusé, en différentes tems, de se soumettre à cette visite. Aujourd'hui un vaisseau neutre, qui refuserait de souffrir la visite, se feroit condamner par cela seul, comme étant de bonne prise.'<sup>1</sup> Vattel is here to be considered not as a lawyer, merely delivering an opinion, but as a witness asserting the fact, that such is the existing practice of modern Europe. And, to be sure, the only marvel in the case is, that he should mention it as a law merely modern, when it is remembered that it is a principle not only of the civil law (on which great part of the law of nations is founded) but of the private jurisprudence of most countries of Europe—that a contumacious refusal to submit to fair inquiry infers all the penalties of convicted guilt. Conformably to this principle, we find, in the celebrated French ordinance of 1681, now in force, art. 12, 'That every vessel shall be good prize in case of resistance and combat;' and Valin, in his smaller commentary, p. 81, says expressly that although the phrase is in the conjunctive, yet that the resistance alone is sufficient.<sup>2</sup> He refers to the Spanish ordinance, 1718, evidently copied from it, in which it is expressed in the disjunctive, 'in case of resistance or combat.' And recent instances are at hand, and within view, in which it appears that Spain continues to act upon this principle.<sup>3</sup> The first time in which it occurs to my notice, on the inquiries I have been able to make in the institutes of our own country, respecting matters of this nature, excepting what occurs in the black book of the admiralty,<sup>4</sup>

<sup>1</sup> See also Bynkershoek, lib. i, c. 14; Valin, tit. *des Prises*, art. 11, p. 270.

<sup>2</sup> In some of the treaties of France this article is expressly inserted in the disjunctive. See treaties between France and the Duchy of Mecklenburg, art. 18, anno 1779. Marten's Treat. vol. ii, p. 40. Also between France and Hamburgh, anno 1769.

<sup>3</sup> "They acted upon this principle in the case of the ship *Thetis*, which was the subject of the case of *Saloucci v. Johnson*, B. R. Hil. 25 Geo. III. to which, perhaps, the learned judge alluded." Marshall's Insurance, 448.

<sup>4</sup> B. 7 & 8.

is in the order in council, 1664, art. 12, which directs that 'when any ship, met withal by the royal navy, or other ship commissioned, shall fight or make resistance, the said ship and goods shall be adjudged lawful prize.' A similar article occurs in the proclamation of 1672. I am aware that in those orders and proclamations are to be found some articles not very consistent with the law of nations, as understood now, or indeed at that time, for they are expressly censured by lord Clarendon.<sup>1</sup> But the article I refer to is not one of those he reprehends, and it is observable that sir Robert Wiseman, then the king's advocate-general, who reported upon the articles in 1673, and expressed a disapprobation of some of them, as harsh and novel, does not mark this article with any observation of censure. I am therefore warranted in saying that it was the rule; and the undisputed rule, of the British admiralty. I will not say that that rule may not have been broken in upon in some instances by considerations of comity or of policy, by which it may be fit that the administration of this species of law should be tempered in the hands of those tribunals which have a right to entertain and apply them; for no man can deny that a state may recede from its extreme rights, and that its supreme councils are authorized to determine in what cases it may be fit to do so, the particular captor having in no case any other right and title than what the state itself would possess under the same facts of capture. But I stand with confidence upon all fair principles of reason — upon the distinct authority of Vattel — upon the institutes of other great maritime countries, as well as those of our own country, when I venture to lay it down, that by the law of nations, as now understood, a deliberate and continued resistance to search, on the part of a neutral vessel, to a lawful cruizer, is followed by the legal consequence of confiscation. This is what I pronounce judicially on this

<sup>1</sup> Life of Lord Clarendon, p. 242.



case, after weighing with the most anxious care the several facts, and the learned arguments which have been applied to them. I deliver it to my country, and to foreign countries, with little diffidence in the rectitude of the judgment itself. I have still more satisfaction in feeling an entire confidence in the rectitude of the considerations under which it has been formed.”<sup>1</sup>

So in a case<sup>2</sup> in which the master of a neutral (American) ship alleged instructions from his employers, directing him not to speak to any belligerent (British) cruisers, Lord Stowell said, “If these instructions are to be taken in their full extent, as authorizing the masters of American ships to fly from British cruisers, it is a practice which will (I venture to say) be attended with very great inconvenience to American navigation. It must be understood that every commissioned cruiser has an undoubted right of inquiry, and it is not the arbitrary decrees of the other belligerent that can abrogate it. On strict principle, to defeat that right by evasion might be as penal as to resist it by force, though it has not been so held in practice:”<sup>3</sup> but certainly it is conduct which is always to be viewed with jealousy, and cannot be set up as an excuse advantageous to the parties in any matter requiring explanation of their conduct.

“The crew of a neutral vessel, taken possession of by a lawful cruiser for the purpose of a legal inquiry, may not be allowed to resort to violence to withdraw themselves out of that possession. I have no hesitation in pronouncing this ship and cargo<sup>4</sup> liable to condemnation, on the ground of the parties having declared themselves enemies by this act of hostile opposition to lawful inquiry.”<sup>5</sup>

<sup>1</sup> See also 8 T. R. 230; 9 East, 283.

<sup>2</sup> Edw. 207, and see Stewart, 70.

<sup>3</sup> 5 Rob. 35.

<sup>4</sup> And so where the cargo was not the property of the rescuers, 2 Acton, 106. But otherwise where the rescuers were enemies, and the owners of the cargo neutrals, 5 Rob. 232.

<sup>5</sup> Lord Stowell, 3 Rob. 278, and see 5 Rob. 232.

But the master or crew of a neutral vessel captured are not bound to assist in carrying her into port for adjudication. Resistance to the captors, by the master or crew, must be proved to have been actually made, in order to subject the vessel to condemnation on this principle of rescue.<sup>1</sup>

On this subject, both the great whig and tory reviews are agreed.

“The right of search for seamen” (says an able writer in the *Quarterly Review*,) “is precisely of the same nature as that of goods contraband of war. Every commander of a ship of war is instructed ‘when he meets with any foreign ship or vessel, to send a lieutenant to inquire whether there may be on board of her any seamen who are subjects of his majesty, and if there be, he is to demand them, provided it does not distress the ship: he is to demand their wages up to the day; but he is to do this without detaining the vessel longer than shall be necessary, or offering any violence to, or in any way distressing, the master and crew.’ In the present day, merchant-vessels only are intended by this instruction; but in the instructions given by the earl of Northumberland, lord high admiral, to sir John Pennington, dated 4th April, 1640, ‘men of war’ are expressly included; and in 1687 a Dutch man of war, coming into the Downs, was visited by the English guard-ship, and four Scotchmen and a boy taken out of her. The Dutch ambassador to the court of London complained of this in a memorial, which he addressed to the secretary of state. The memorial was referred to sir Richard Raines, then judge of the admiralty court, who defended the principle, on the natural right which sovereigns have to the services of their subjects, and on the practice which had been followed in all ages. He contended that ‘his majesty, having this right, must be allowed to have the liberty of means effectual to this end, which means are to compel his subjects to do their duty; otherwise the right is vain; and so are the means, if they must be used only by words and proclamations.’ The complaints of the Dutch of our unfriendly treatment of them,

<sup>1</sup> 1 Acton, 33, and see 2 Acton, 20.

in visiting ships of war in search of English seamen, had indeed induced king Charles II. to bring the matter under serious consideration. In 1677, it was discussed at the board of admiralty, at which the king, as was not unusual in those days, presided in person. The standing instructions being read, and the first point regarding the search of foreign ships of war for English subjects, and the demanding and taking them out, being submitted, it was resolved, 'It is our right and to be continued.' It appears, however, from the Pepysian papers, ultimately to have been settled, that, although the practice was too ancient (as well as justified by the king's natural rights) to make any variation in the instruction with respect to demanding them from foreigners, yet it was judged advisable to leave out the clause which compels the master to pay them their wages, as being unreasonable on many accounts; and although the article of examining foreigners was to be continued in the public instructions, yet Mr. Pepys was directed to draw out a private article, instructing our commanders to be discreet in the execution of it to foreign merchantmen; and, as to men of war, only to make use of such fair means as they could, without any force, to inform themselves of the number and names of his majesty's subjects on board of them; and, if refused to be delivered up, on a fair demand, to report the matter to the admiralty, in order that the king may demand them together with satisfaction for their detention.

"We are not aware that any instructions subsequent to the reign of Charles II. authorized the searching of men of war; nor do we know of a single instance of the kind having occurred since that of 1687, till the late American affair of the Chesapeake, in which the conduct of the British admiral (Berkeley) was wholly disapproved by his government, and he was immediately removed from his command."<sup>1</sup>

The law of nations as now settled stands thus:

"If the foreign vessel refusing search" (says lord Brougham in the *Edinburgh Review*), "is a ship of war, such conduct is a

<sup>1</sup> Pepys's MS. Collection in the Admiralty Records.

<sup>2</sup> *Quart. Rev.* vol. vii, pp. 17-21.

direct injury committed by the government of one nation against another, for which he has a right to seek redress by going to war. But if the offending vessel belong not to a foreign government, but to a private trader, the case is different. For no power can be effectually responsible for the conduct of all its subjects on the high seas; and it has been found more convenient to intrust the party injured by such aggressions with the power of checking them. This arrangement seems beneficial to all parties; for it answers the chief end of the law of nations — preventing injustice without the necessity of war. Endless hostilities would result from any other arrangement. If a government were to be made responsible for each act of its subjects, and a negotiation were to ensue every time that a suspected neutral merchantman entered the enemy's port, either there must be a speedy end put to neutrality, or the affairs of the belligerent and neutral must both stand still. If the suspected vessel is a ship of war, ~~no~~ such inconvenience can follow from seeking redress by negotiation merely. A neutral has very few ships of war: if she has many, this is a circumstance of evidence against her, and a good ground of complaint. Not only is this remedy easy and safe to all parties, but it is the only remedy which is not exceedingly liable ~~to abuse~~, and full of danger to the public peace of nations. No serious consequences are likely to arise from allowing men of war to search merchant ships, more especially if the right is confined ~~to~~ vessels of the state, and withheld from privateers. Nothing ~~but~~ hostility can result from allowing one ship of war to search another ship of war, because, if a national spirit is anywhere to be found, it is on board of such vessels. Moreover, the injury done to a private trader by searching is insignificant, compared to the benefit secured to both nations by such a practice. But the injury done to a ship of war by searching is both much greater in itself, from the insult to the honor of the crew, and bears a much greater proportion to any good which can be supposed to result from the practice, even on the highest estimate, because there are very few such vessels to search.”<sup>1</sup>

<sup>1</sup> Edinb. Rev. vol. xi, pp. 9, 10. In the year 1818, a treaty was set on foot between Great Britain and the United States of America for the abolition, as

The right of visitation and search on the high seas does not exist in time of peace. "It is true," says lord Stowell, "that wild claims have been occasionally set up by nations, particularly those of Spain and Portugal, in the East and West Indian seas; but these were claims not of a general right of visitation and search upon the high seas unappropriated, but extravagant claims to the appropriation of particular seas, founded upon some grants of pretended authority, or upon some ancient exclusive usurpation. Upon a principle much more just in itself, and more temperately applied, maritime states have claimed a right of visitation and inquiry within those parts of the ocean adjoining to their shores, which the common courtesy of nations has, for their common convenience, allowed to be considered as parts of their dominions for various domestic purposes, and particularly for fiscal or defensive regulations, more immediately affecting their safety and welfare. Such are our hovering laws, which, within certain limited distances, more or less moderately assigned, subject foreign vessels to such examination."<sup>1</sup>

The municipal law of Great Britain and Ireland is violated by any persons dealing in slaves, or exporting or importing them, or shipping them for such purposes, or embarking capital in the slave-trade, or guaranteeing slave-adventures, or shipping goods &c., to be so employed, or serving on board of slave ships, or insuring slave adventures, or forging instruments relative to the slave laws. The penal-

between those nations, of the right of search for each other's subjects. The intended articles recited "the inconveniences which had arisen from the difficulty of discriminating between the subjects and citizens of the two powers respectively;" but the negotiation failed, according to Mr. Rush, one of the American plenipotentiaries, upon two differences of mere detail. See Rush's Residence at the Court of London, chap. xx. There is no treaty with America for the reciprocal search for slaves, and consequently no such right of search. Any detention and search of an American ship must therefore be made at the peril of her not turning out to be a slaver.

<sup>1</sup> 2 Dods. 245, 246.

ties are, forfeiture of the ship and the owner's goods, and of double the value of the shipments; and the offences are besides, a transportable felony in superior officers and persons, and a misdemeanor in petty officers and seamen serving on board such ships.<sup>1</sup>

In the construction of the 45th section of this act, which extends to persons seizing and prosecuting under the benefit of the 4 Geo. 3, c. 15, and any other act made for the protection of officers seizing and prosecuting for any offence against the said acts, it has been decided by the judicial committee of the privy council,<sup>2</sup> "that it is not the provisions for their benefit, but for their protection only, that are referred to, such as the exemption from liability to costs and actions for seizures, if the judge should certify that there was reasonable cause for seizure; and that therefore the burthen of proof of the facts necessary to constitute a liability to forfeiture or penalties lies on the prosecutor, as in ordinary cases, and not on the defendant as under those acts, and consequently, that it does not lie on the master to prove that any persons on board of his ship were not slaves, or persons falling within the description of the act, nor to disprove his knowledge of that circumstance, if such knowledge be necessary to constitute the offence."

<sup>1</sup> 5 Geo. IV, c. 113, ss. 2, 4, 10, 11.

<sup>2</sup> Case of the *Winwick*, 3d July, 1840, not yet reported.

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ART. IV. — THE RIGHTS OF GREAT BRITAIN TO REDRESS, AND OF THE UNITED STATES TO INDEMNIFICATION, RESPECTIVELY, IN THE AFFAIR OF McLEOD AND FOR THE BURNING OF THE CAROLINE.

THE acquittal and discharge of McLeod, we may be permitted to believe, will prevent the occurrence of actual war

between the United States and Great Britain, by removing that miserable entanglement which existed in their diplomatic relations. Still there remain serious difficulties growing out of questions connected with that subject and the respective rights of the two countries involved in those questions.

If the detention and trial of McLeod amounted to an act of retaliatory hostility on the part of the United States, their responsibilities and the degree of redress will be immeasurably greater than if the wrong inflicted in that case, though constituting a claim for redress, was not of a character to dissolve existing relations of peace. The British government, as we have attempted to show on a former occasion, was aggrieved by the arrest of that individual, because it was an attempt to avoid the consequences of the pendency of negotiations. If Great Britain should establish her right to make the incursion in the case of the *Caroline*, a consequence would be the entire justification of the individuals of the party, within the line of their authority. There was an incompatibility in proceeding criminally against the subject, whilst negotiating with the sovereign respecting the lawfulness of an act, in which the subject was an agent only of the state. In such proceedings there would be faithlessness on the part of the state resorting to them, and indignity to the sovereign whose subject is indicted for obedience to commands, the rightfulness of which, it is agreed, shall be made the subject of negotiation.

This incompatibility, this faithlessness, and manifestation of indignity, all result from the consideration that the criminal proceedings are instituted by the state, which, claiming to have suffered a wrong, yet consents to negotiate and to waive the right of enforcing measures of redress.

The obligations of the government of the United States affect directly only the federal government, and do not create any claim on the individual states. The general government

is, to a certain extent, answerable for the action of the state tribunals, but cannot directly control them. Although the weakness or peculiarity of our system furnishes no excuse for failure in the performance of our obligations, yet if there is a mode in which those duties may be performed, it is quite unimportant that the mode is indirect.

In the case of McLeod, if the United States had been a consolidated nation, exercising all the functions of government, instead of a confederacy, acting under a constitution of enumerated powers, whilst the residue of the functions of government were exercised by the individual states, that person would have been indicted in a court of the United States, and if the obligations of the government required it, the executive might have ordered a *nolle prosequi* to be entered at once: but as the indictment was pending in the state of New York, over the criminal jurisdiction of whose courts the president had no direct authority, he could only call on the executive of the state to perform those acts which the general government, as representing the state of New York, was responsible for. Then it became the duty of the governor of the state to direct a *nolle prosequi* to be entered immediately, and as it was a part of the oath of office of the governor, faithfully to execute his duties under the constitution of the United States, he would be guilty of a gross violation of those duties, in failing to yield to Great Britain those rights which the president had recognised in the exercise of his constitutional functions. The detention and trial of McLeod was not, therefore, a national act. The courts are bound to proceed and try indictments pending before them. The president has no other way of suspending proceedings, than by applying to the governor to exercise his official duties, by ordering a *nolle prosequi*. If the governor of the state refuses or fails to perform that duty, he is guilty of malversation in office, for which, perhaps, he is impeachable; but his neglect or refusal to execute those duties which



have been settled by the general government, and which have been prescribed to him as flowing from rights vested by treaties in a foreign power, does not present the United States in the light of a nation faithless to treaties. And if the president resorts to all constitutional means within his power to fulfil the duties of the country, certainly no indignity is offered to the sovereign, whose subject is detained by an officer of the government, who in that detention not only acts without authority from the government, but violates his own constitutional duties. No incompatibility exists between negotiations and criminal proceedings under such circumstances, because the United States are not a party to such proceedings. The governor of the state has acted on his own responsibility, and violated his duties to the general government. Although he is the head of a sovereign state, still where the federal government supersedes the individual states, becomes responsible for them, as it does in all foreign relations, and represents them, creating obligations by treaties and divesting them of preëxisting rights, the officers of the states, in the exercise of duties imposed upon them by law relative to those subjects, become subordinate to the general government.

The wrong done to McLeod was regarded as injurious to Great Britain, because it was considered a measure of retaliation, and an act of war on the part of the United States, such as would not admit of the existence of relations of peace on the part of Great Britain. But if the hostile act is disclaimed by the United States, and if it is shown to depend upon the breach of duty by a subordinate officer, subordinate on all questions of war and peace, then it cannot be regarded as retaliatory on the part of the United States. Under these circumstances, the subject is to be regarded precisely as if the wrong had been inflicted by a subordinate officer of the United States upon a British subject, entirely disconnected with the government, instead of

an individual arrested for having acted in obedience to its commands. The United States might be responsible for the safety of a British subject thus unlawfully detained, but if the detention was not a measure of retaliatory hostility, the act would not preclude negotiation, and might be redressed or atoned for like any other wrong.

So, if, on the other hand, a citizen of the United States had been arrested within the territories of the United States and carried into Canada, as has recently happened, the British government might be responsible for his safety, but the mere arrest and detention would not be an act of hostility. If the individual could be connected with the government of the United States, however, as McLeod has been with the British government, the case would be different. And if the Canadian authorities should refuse compliance with the requisitions of Great Britain for his release, that power would not, in the case supposed, be responsible as for an act of aggressive hostility, even if the individual represented the government of the United States in the act for which he might be indicted.

If a different rule were to prevail, great mischief would be the consequence. Nations have it not in their power, at all times, to carry into effect their laws throughout the extent of their dominions, or to render the officers of government in every department of the state obedient to the behests of the sovereign head. The admiral of a British fleet may, for example, detain a sailor who has been impressed and punish him as for a personal offence, for obeying the commands of a foreign government, and he may refuse to deliver him up on the requisition of the government of Great Britain, without compromising the relations of peace sustained by his sovereign. He has been guilty of a great offence against the state, for which he would be liable to punishment, but the sovereign, having made all proper exertions to fulfil the duties of the state, would not be considered as standing in

a hostile attitude. If the judges of Westminster hall should permit the ambassadors of foreign powers to be arrested by the process of their courts for debt, or to be subjected to indictments for the violation of municipal regulations, they would be worthy of impeachment, but the government would not be regarded as having violated the obligations of treaties, if it had resorted to suitable means to prevent the outrage. If the Canadas or Ireland should be in a state of revolt, and if the government should be unable to sustain the principles of international law, Great Britain would not be responsible for their infraction, however foreign states might be injured by the violation of those rights, of which Great Britain had guaranteed the observance. So, if in the case mentioned in the British parliament, an appeal of murder had been made in England, in a case similar to that of McLeod, the government might be unable to intervene and put an end to the process by a pardon or in any other way, by reason of a constitutional difficulty, and yet the nations would not have been chargeable with any act or neglect calculated to disturb relations of peace.

Some confusion has existed in England, in the view taken of the case of McLeod, from not discriminating properly between the rights of that individual and those of Great Britain. It has been supposed, that as Great Britain had a right to exact from the United States a consistent line of conduct, and that as Great Britain was bound to protect her subject, in acting in obedience to her commands whilst the United States continued at peace with the sovereign, and as, in certain circumstances, a wrong inflicted on the individual would constitute hostilities against the state, that, therefore, under all circumstances, an injury to McLeod must be considered an outrage upon Great Britain. It has been assumed in the debates in parliament, and we believe in diplomatic communications, that unless his safety was guaranteed, war was inevitable, but this view of the subject

is erroneous. The importance attached to the wrong done to McLeod depended upon the consideration, that he was a party to the exercise of the claim of belligerent right, and that the United States was proceeding against him as the representative of his government in its belligerent acts. But the proceedings against McLeod do not constitute a wrong amounting to hostilities, unless the United States are a party to those proceedings. Acts of hostility cannot be committed by integral parts of the nation, though gross injuries may be inflicted for which the nation is eventually liable. It is true, that an indictment instituted by the state of New York is the only mode in which the commonwealth could proceed against the parties concerned in the aggression on their territory, and *primâ facie* such criminal process might be regarded as sanctioned by the United States; but it might also be disavowed, and then it could no longer be considered as emanating from the government. If the United States had not disavowed the acts of the state of New York, they would have been regarded as retaliatory, and would have been followed by hostilities on the part of Great Britain. When disavowed by the United States, those acts should be regarded simply as wrongs, for which the United States were bound to render an indemnity. McLeod is not benefited by the disavowal of the United States. His wrongs continue the same as if the federal government had authorized the indictment, and the United States may be bound fully to indemnify him, but Great Britain is not directly injured by the proceedings, because the United States, as a nation, are not a party to them. Great Britain is bound to protect her subject in the execution of her commands, and the United States to do every thing within their competency to prevent or redress a wrong; but if by reason of the failure of individuals to execute their official duties, or by a *quasi* revolt of an integral member of the confederacy, the government

is made unable to perform all its obligations, such redress must be furnished as it has power to render.

If Great Britain should deem that redress inadequate, she may find therein a cause and a motive of war, but surely if the government of the United States has not been instrumental in the injury; the wrong in itself is not an act of war.

The great difference between the present relations of the two countries, and such as would have existed if the United States had not yielded to the justice of the demand of Great Britain, consists in this, that in the event that the United States had sanctioned the indictment, actual hostilities would have existed, because the criminal proceedings themselves would have been an act of war. The United States having disavowed that measure, Great Britain can treat the wrong which she receives from the state of New York as a cause of war or not, at her election. Actual war it does not constitute. ~~If the~~ United States had justified the detention of McLeod, and thus rendered it the act of the government, the negotiations pending between the two countries must have been broken off. The injury to the subject, perhaps the injury to Great Britain, would have continued the same as if the United States had been the actor, but the mode of redress would have been different. When the United States disavowed the criminal proceedings, Great Britain might seek redress by negotiation, but if the United States had been a party to those proceedings, to have continued negotiations would have been impossible; Great Britain must have sought redress by arms. There may be stated many cases of aggression against a foreign power, by an individual state, where the general government, if a party, must have been regarded as engaged in actual war, but if disavowed by the United States, the injured nation may treat the wrong as an act of war or not, at its election. If the state of New York, by way of retaliation for the supposed wrong of burn-

ing the *Caroline* within the territory of the state, had occupied a part of Canada with an army, Great Britain might very properly have made war upon New York in return, which would in effect have amounted to hostilities against the United States, or she might have sought redress from the general government by negotiation; but if the United States had been a party to the occupation of Canada, such an act of war could only have been met by correspondent hostilities. Even while New York continued in possession of a part of the British dominions, there would be no incompatibility in the pendency of negotiation between Great Britain and the federal government, of which New York is an integral part; but there would be a very great absurdity in any attempt to carry on negotiations, as compatible with relations of peace, whilst the United States occupied and persisted in the claim to occupy, by way of retaliation, a part of the British dominions in like manner.

If the United States, hereafter, with a view to terminate an unsuccessful war respecting the disputed boundary, should yield to the claim of Great Britain, and cede by treaty a part of the state of Maine, and if that state, resting upon her alleged sovereignty, should refuse to submit to the treaty and continue to occupy the territory ceded, Great Britain might waive her right to repel the hostile occupation, and whilst continuing at peace with the United States, seek redress from the general government. She might, with entire honor, disregard the hostile demonstrations of the state, which might be guilty of hostile aggressions, but could not carry on regular war. But if the belligerent state was maintained by the general government, the refusal to yield to the engagement of the treaty, would be incompatible with peace, and would amount to a renewal of hostilities. The case stated, however, would by no means be so strong as that in question, because the occupation of the territory might be regarded as a simple claim of right, but the deten-

tion of McLeod by the government would be retaliatory, and affect the honor of his sovereign.

It may be said, that the general and state governments do together but constitute the complement of sovereignty; that in those departments where the powers of the general government do not reach, the state government is sovereign, and that so far as it acts within its legitimate sphere, it is the only sovereignty which can subject the nation to liabilities; that it is a matter of very little importance to establish the point, that the United States are not a party to the wrong, if the injury suffered by Great Britain is still the same, and if that power can find redress only from the United States, which are responsible for every integral part of the confederacy. Great Britain, it may be said, cannot negotiate with the individual states, and she cannot declare war against them and thus enforce redress, and that, therefore, the general government representing the states assumes all their liabilities, and must bear all the responsibilities which result from their acts in their sovereign capacity.

But although certain of the powers of sovereignty are reserved to the individual states, the entire department of foreign relations is entrusted to the general government, and on every subject relating to this department, the several states are entirely divested of power. The United States are responsible for all the acts of the states within the range of their proper jurisdiction. They are responsible for the safety of McLeod in the same manner as if his trial had taken place in the courts of the United States, because the proceedings against him were maintained by a branch of the sovereignty. But the peculiar liability of the government of the United States in the present case, as for an indignity, must depend upon the hostile intent; when it becomes there important to determine *quo animo* any measure was adopted, it is not sufficient to infer a hostile intent from the act itself of an individual state, because a state cannot,

in regard to foreign relations, represent the general government. If the United States disclaim a measure of hostility, they may be liable for the wrong inflicted, but not as for a measure of retaliation.

In almost every instance of aggression and wrong by one nation against another, the injury may properly be presented in the ordinary course of negotiation to the party guilty of the aggression. There is at least one case, however, where this can never be done, though formal war may not have been declared. Where a nation in the pursuit of a claim of belligerent right is *primâ facie* guilty of a wrong, and the injured nation, instead of offering to negotiate, retaliates for the supposed wrong by another aggression, in which the latter nation persists, there can be no negotiation, for war substantially exists. It is impossible to make the case stated clearer, than by citing the instance which has actually occurred. The government of Great Britain authorized a detachment of its army, under a claim of belligerent right, to follow the Caroline into the waters of the United States and there destroy her. It was prepared to justify the act by the plea of necessity, which would, if allowed, show that the individuals engaged in the enterprise were guilty of no crime, but the state of New York, without entertaining the claim of right, and the plea of justification took the ground, that there could be no such justification of an act, which was *primâ facie* a crime. If this ground had been taken by the general government, actual war would have existed because it precluded an inquiry into the claim of right. It would have been an election to consider the supposed wrong as a cause of war and to enter upon acts of retaliation, after which the two countries could only negotiate as for a restoration of peace. Negotiations upon the footing of existing relations of peace would be absurd, and incompatible with acts amounting to retaliatory hostilities. This consequence only results from the consideration, that



the proceedings which have this effect are on behalf of the government supposing itself wronged, against an individual, who, being a party to that wrong, represented the government under whose authority he acted. They are equivalent to an act of war, because they are retaliatory upon acts of *quasi* hostility on the part of Great Britain, which were *prima facie* unjustifiable, and made it in some measure necessary for the United States to elect, whether to meet the aggression by peaceful or hostile measures. If a British subject had been arrested by the authorities of the state of New York for obedience to the lawful commands of Great Britain within her own dominions, no such result would have followed, because it would not have been in itself an act of war. The wrong to Great Britain, perhaps, would be greater than in the case which has occurred, but the character of that wrong would be different. Though indefensible, it might be a proper subject for negotiation during the existence of relations of amity, and not have the effect of creating a state of war. It is not then the nature or degree of the wrong done by one nation to another, which would determine their existing relations. The greatest might not create actual war, the least might constitute, in other circumstances, a state of existing hostilities. It is therefore apparent that the design, the motive, and the intention of governments, are to be regarded in considering the effect of their acts of aggression. The great question then is, have the United States, by any act of retaliation, engaged in measures inconsistent with relations of peace with Great Britain. And, certainly, if any measures of hostility have been pursued by way of retribution for the burning of the *Caroline*, they have not been adopted by the government of the United States. The government has never sanctioned criminal proceedings against individuals concerned in that enterprise, nor sought by the punishment of the subject to obtain satisfaction from the sovereign. Nor has the govern-

ment been content simply to repel the conclusion, that the United States were a party to the criminal proceedings against the individual supposed to have been engaged in that affair, but it has resorted to all suitable measures to prevent the occurrence of the wrong. McLeod has been detained and tried not only without the concurrence of the government, but after the decision of the executive of the United States, that his entire immunity was a right resulting from the existing relations between the United States and Great Britain, and notwithstanding such efforts for his release as were competent to the general government, following the prompt admission that the claim for his discharge ought to be admitted. How then can it be said that the United States are a party to these hostile proceedings? Simply upon the ground, we presume, that the United States are to be regarded as identical with the sovereignty of the state of New York, because criminal proceedings on behalf of the commonwealth could not have been instituted in any other tribunal. But it is by no means true that the state of New York is capable of establishing a state of war between the United States and any foreign power, except at the election of the latter. If that state had marched an army into Canada by way of retaliation for the violation of her territory, such a belligerent act would not of necessity have involved the United States in war. To prevent that result, it would only have been necessary for the government to disavow the acts of the state, and then the hostilities of the state would have been viewed in no other or higher light, than the military operations of those unauthorized brigands, whose warlike aggressions clothe them with none of the rights and privileges belonging to regular warfare.

But if it is admitted that the United States are not, by the measures of the state of New York, involved in immediate hostilities, still the question may arise whether it is not the duty of the general government to prevent such

measures on the part of the individual states as are in their nature hostile, and whether, by a neglect to coerce obedience to the government, the United States are not as a nation involved in the hostile measures set on foot by an individual state. We think it must be conceded that the United States are, as a government, fully responsible for the wrongs done by the individual states, whether they are in a state of revolt, or refuse to yield to the just claims of a foreign power, but the question which we are now considering is not whether the United States are eventually liable for the acts of the states, whether they are bound to indemnify Great Britain for the unjust detention of her subject, which must be admitted, nor whether Great Britain may not at her election treat this injury as a cause of war, which must also be conceded, but whether the injury was in itself an act of war, an indignity which admitted of no peaceful redress, but produced a state of things incompatible with the existence of negotiations.

There are several causes which may operate to prevent the government of the United States from exercising its authority, in restraint of hostile proceedings against a foreign power by an individual state. The state may not only be in a condition of revolt, but the officers of the state may refuse to execute the duties which the constitution of the United States has devolved upon them, and which by their oath of office they are bound to perform, or the constitution of the United States may have failed to provide for the intervention of the general government, or for a resort to its tribunals. In each of these cases, notwithstanding the eventual responsibility of the general government, it may be entirely impossible for it to withhold an individual state from hostile measures against a foreign power. The hostile intention, however, is absent, for it cannot be inferred that the government is a party to acts which it disavows, but has no legitimate means of preventing.

In the case of McLeod, the executive of the state of New York failed to perform his constitutional duties, and to yield to the claims of Great Britain, the justice of which the executive of the United States had in its appropriate functions, acknowledged. The executive of the state, in this case, grossly violated its duties and endangered the peace of the two countries, but the executive of the United States had no constitutional power to interpose directly, and a direct and immediate intervention was the only mode in which proper redress could be given, because the detention for a period, however short, was in violation of right.

It might seldom happen, perhaps, under a monarchical government, that there could be a constitutional difficulty in the way of any intervention of the sovereign in the tribunals of the kingdom, which his foreign relations might require, and yet the action of the government might be obstructed, and the fulfilment of its duties embarrassed, in the same manner as has happened to the government of the United States. There may be stated not only the case of a disputed succession to the crown and the occupation of a province by a rival claimant of the throne, and the case where parts of the kingdom are in a state of revolt, so that protection could not be given to the subjects of a foreign country within those districts, but the officers of the state might also refuse to perform their duties even under a form of government like that of Great Britain, and thus embarrass the foreign relations of the kingdom as effectually as has happened in the instance which we have noticed. If the judges of Westminster hall should refuse on a writ of *habeas corpus*, to discharge a subject of a foreign state unjustly detained without color of right, in violation of the duties of the government to his sovereign, they could be reached, if at all, only by the slow process of impeachment, a remedy as tardy and perhaps as certainly ineffectual, as such a proceeding would be against any of the executive

officers of the state of New York who have violated the duties devolving upon them under the constitution of the United States.

If the East India Company, a remarkable instance of a corporation almost independent within a state, should proceed against a citizen of the United States in a case parallel to that of McLeod, the direct intervention of the British government might fail of immediate effect as remarkably as that of the executive of the United States would have done, if exerted to deliver a British subject on his trial in the tribunals of the state of New York, and yet it would be absurd to contend that the British government was a party to such a measure of hostility, though that government had admitted its injustice and endeavored to provide a remedy.

It may be said, that as the government of the United States presents itself to foreign powers in the capacity of a sovereign and independent nation, they are bound to sustain the character of a government possessed of the full powers of sovereignty, and that assuming to exercise and to exact the obligations belonging to a state, they are bound to sustain and to enforce throughout every department of the government the full authority of the state. In reply to the allegation, that the government of the United States is one of limited powers, and that certain functions of the government are exercised by the individual states, the answer of a foreign power might be, that it had negotiated with the government of the United States as one possessed of supreme authority; that the federal government presents itself in that character in assuming to conduct all the foreign relations of the confederacy, the individual parts of which are restrained by the constitution of the United States from treating with foreign powers; that if the federal government cannot enter into treaties and conventions which are binding upon every member of the union, and which the United States are capable of enforcing against the several states, no

valid engagement can be made by the government, unless it is to be ensured that foreign states should be bound by treaties with the United States, the obligations of which they are not on their side capable of enforcing. But these considerations are only important as showing the right of Great Britain to indemnity, or her right to make the acts of individual states a cause of war against the United States, if she should elect to seek that mode of redress, and have no bearing upon the question, whether the government of the United States has made itself a party to any existing measures of hostility. The difficulties attending our constitution, its defects, the recusancy of state officers and the vain efforts of the executive to sustain the obligations of the nation, are all important considerations to show that the government is not committed voluntarily to such measures as make it imperative on the British government, in point of honor, to meet our hostile measures in a correspondent spirit.

It is quite too much to claim on behalf of a foreign state, that the federal government shall in all cases exercise a direct authority to enforce the fulfilment of treaties and the observance of rights which result from them, and ~~the~~ delay or neglect to exercise those powers which are within the competency of a despotic ruler must necessarily occasion war. Even the powers of sovereignty are so distributed in Great Britain, though a monarchical government, that it is quite possible for the different departments of the state to thwart the executive and prevent the immediate fulfilment of duties to foreign powers.

Admitting, however, that Great Britain may sustain the ground taken by her, that no claim of irresponsibility on the part of the United States can be entertained, founded upon the peculiarities of their constitution of government, and assuming that the responsibilities of the government are the same as if the separate state sovereignty did not exist, still

it may well be contended that, in that view of the subject, the United States are not even responsible in any degree for the detention of McLeod by the authorities of the state of New York.

In demanding the release of McLeod, the government of Great Britain proceeded upon the principle, that the United States could not institute criminal proceedings against the subject, and remain at peace with the sovereign authorizing the act alleged to be criminal. But if the authority of the state of New York is not to be regarded by a foreign power, then the criminal proceedings are not to be viewed as emanating from the sovereign authority, nor is the commonwealth to be regarded as an actor in the indictment. If Great Britain can only consider the government of the United States in her relations with this country, and cannot take cognizance of the individual sovereignty of New York, then she cannot view her as a sovereignty for any purpose, and must regard the indictment against McLeod as having proceeded from irresponsible individuals. In this point of view the case is the same in principle as would have been the aggression on the soil of the United States and the burning of the *Caroline*, if the act in that case had been disclaimed by Great Britain. The United States hold Great Britain responsible for that act only because the government authorized or approved of it, and Great Britain can only regard the United States as responsible for the detention and trial of McLeod, on the ground that the government authorized and approved of those proceedings. Let us not be misunderstood. We do not maintain that the United States are not responsible for the proceedings of New York in this case whilst acting within the range of her reserved sovereignty. We arrive at the conclusion, that, although the United States, having disclaimed the measures of retaliation against Great Britain in the person of her subject, are not responsible for the indignity, that they are responsible for the actual injury and

bound to render an indemnity, in consideration of the complex system which leaves the exercise of certain functions of the commonwealth to the state sovereignty, whilst the conduct of foreign relations is assigned to the federal government. We meet the doctrine of Great Britain that she can only regard the government as one and indivisible, with the answer, that if foreign powers are not bound to consider an individual state as possessing any of the rights of sovereignty, then the consequences which attach to the exercise of such rights cannot give those foreign powers a claim to indemnity. Then if we view New York as an integral part of a consolidated nation, as a municipal division or district of the United States, occupying the same rank in relation to the federal government as Scotland and Ireland, or perhaps the English counties in relation to the kingdom of Great Britain, how is the government of the United States responsible for proceedings in criminal courts to which the commonwealth is neither directly nor indirectly a party? It can only be claimed on the ground that the United States were a party to the indictment against McLeod, as not distinguishable in principle from the state of New York in the exercise of her reserved sovereignty, because nationality is in its nature indivisible, that an incompatibility existed between negotiation and criminal proceedings thus hostile in character. If the proceedings were not instituted in the name and on the behalf of the commonwealth, then no inconsistency resulted from their pendency. It does not follow, because a foreign subject is unjustly harassed by criminal process for acting in obedience to the commands of his sovereign in the exercise of a claim of right, the justice of which may have been established or is pending in discussion, that either the injured individual or the nation to which he belongs is entitled, of course, to satisfaction or indemnity from that country under whose government the injury was inflicted. To support that claim, it is necessary to connect the govern-



ment itself with the injury as a party. If the process does not emanate from a tribunal regularly established, if it is not in the name of the state, conducted by its officers and subject to its control, the government cannot be made responsible, and the injury inflicted is the wrong of individuals and can constitute no claim against the state.

If McLeod had been indicted otherwise than for a crime against the ~~commonwealth~~, his only remedy would have been against the individuals at whose hands he had suffered the wrong. If a civil action had been sustained against him in any local tribunal, he would have had no remedy, however grievously amerced. It is only by connecting the commonwealth (by which we mean to express our conception of that nationality which had its existence in the complex system of federal and state sovereignty), with criminal process, that a subject of a foreign nation can render the government itself responsible for injury.

The view taken by the British ministry, of the liabilities of the federal government, seems to be founded upon the idea that our system constitutes a consolidated government, and that the several states are to be viewed as so many counties. Regarded in this light, criminal process in the name of the state would no more compromise the United States, than criminal process, in the name of the county palatine of Chester, would affect the crown of Great Britain.

But the view taken by Great Britain of our system and of her claims as resulting is erroneous, and as it is no part of our purpose to reply to those claims, and prove by her own showing that they do not exist, as we are viewing the question in point of principle, and aim only at those results which flow from principle, we must concede that the United States are, beyond all question, responsible for the acts of the sovereign state of New York within its appropriate sphere. As the detention and trial of McLeod was a grievous wrong, the United States are bound to provide a full indem-

nity for that injury, though as we earnestly contend, it did not constitute the *casus belli* which must have precipitated instant and general hostilities, as the criminal proceedings instituted by the state of New York would have done if sanctioned by the government of the United States. It is quite possible, although the difficulty is for the present removed, by the acquittal of McLeod, on the ground that he was not proved to have been one of the party engaged in the attack on the Caroline, that the evil may recur, if any of the individuals actually concerned in the aggression should be found within the jurisdiction of New York. It is important, therefore, to the peace of both countries — *paci quæ nihil habitura sit insidiarum* — that the question should be immediately settled, whether the aggression of Great Britain was a lawful exercise of belligerent right, or whether on the other hand, the United States are entitled to redress as for an unjustifiable violation of their territory.

We conceive that this depends entirely upon the question whether the United States have fully sustained their duties as a neutral nation.

We expressed the opinion on a former occasion in conformity with the doctrine laid down by Bynkershoek,<sup>1</sup> that a belligerent would be justified in pursuing an enemy *dum ferret opus*, into the territory of a neutral, but this is not the only case in which a belligerent nation would be authorized to enter a neutral territory. That right may be exercised when any aid is given to one belligerent by a neutral nation within its territory, or when a belligerent is permitted to prepare an enterprise within the neutral territory.

The discussions of the duties attending a state of neutrality, which are found in the publicists, relate to a state of things very different from that existing in the present case. When belligerents are separated from each other by the territories of a neutral state, a grant of passage may properly

<sup>1</sup> Q. J. Pub. book i, chap. 8.

be given by the neutral to either party, but when one of the parties is defeated he ought not to be permitted to retire into the territory of the neutral to recover and wait for a favorable opportunity to renew the attack; otherwise the neutral gives a right to the other party to enter his territories in quest of his enemy.<sup>1</sup> The principle is equally applicable to a case where one of the belligerent parties consists of outlaws, gathered from two neighboring countries, and seeks for the opportunity of attacking one nation whilst deriving strength from the resources of the other. In such a case, it is the duty of the neutral state to restrain or drive from its territory the hostile band, and if this obligation is neglected, the nation which is threatened with hostilities would seem to have a right to enter the neutral country in search of its enemy. It is on this ground, if at all, that general Jackson was justified in pursuing hostile bands of Indians into the territories of Spain, a precedent which, according to the rule of Bynkershoek,<sup>2</sup> the United States having adopted, they are, by a species of reciprocity, bound to allow in their intercourse with other nations.

If Great Britain cannot be strictly justified, in her act of aggression, the degree and nature of the wrong will depend upon many considerations which affect the question. If the United States have been aggrieved, the extent and nature of the injury and the measure of redress may be greatly modified by facts which attend the case, and no general rule can be applied to a violation by one nation of the territory of another.

Many cases may be stated of hostile gatherings and armaments within a neutral district where the danger would be imminent to the conterminous country. If Navy Island had been an impregnable fastness, commanding the lakes and the river and the approaches to the sea, it would have

<sup>1</sup> Vattel, book 3, chap. 7, sect. 132.

<sup>2</sup> Q. J. Pub. book i, chap. 8.

been a point difficult to maintain that a British commander might not cross the imaginary line of the United States, if that was necessary, to prevent such a hostile occupation of the fastness as could by no means be dislodged. And even if Great Britain could not strictly exercise such a right, it would be difficult to sustain the ground that the United States were entitled to any other than nominal redress, if their measures, however well designed, were totally inadequate to prevent the hostile party proceeding from the territories of the United States to make the occupation. If the enemies of Great Britain should decamp securely within the territory of the United States, draw all their munitions of war and recruit their forces from the United States; if the government took no measures to prevent the invasion of a country with which they were at peace, and Great Britain ward off the blow just ready to be inflicted on her by crossing the boundary of the United States, what atonement under such circumstances ought Great Britain to make or the United States to receive? Would the United States in such a case, come with clean hands, to use a phrase of the court of chancery, in calling Great Britain to account for the supposed wrong. Besides there are certain cases where necessity controls all law. The artificial rules of law which have been adopted into the international code, the usages of nations which are founded upon their beneficial working, cannot be allowed to decide cases where the very existence, or the well being of a state, would be destroyed by their operation. Necessity in extreme cases cannot be governed by arbitrary rules of law in the relations of individuals or nations. When questions of this character arise between conterminous nations the necessities of defence are often of the most urgent nature.

It is impossible to claim that under all circumstances the enemies of Great Britain would be protected in their outrages upon the subjects of that country by the boundary line of

the United States, though it might be the duty of the British government to demand the interposition of the United States, when the necessity of the case were not too urgent, unless the protection afforded by the latter power was absolute and complete, unless it was promptly afforded, if delay would be ruinous or attended with great hazard, the country exposed to eminent invasion would be justified in destroying the aggressor even within the territory of the neutral. There are however nice shades of distinction which affect the subject and which vary with the varying circumstances of individual cases. A country might be justified in anticipating and preventing the blow which was about to fall, before the aggressor had crossed the line of the neutral nation, and yet be incapable of justifying an incursion into the territories of that nation to destroy the means of wrong and injury, which had not yet assumed a formidable front. It might be justified in assailing an army in hostile array, ready to make an invasion from the neutral territory and yet not be authorized in destroying munitions of war, which might be means of annoyance on a future occasion. It is the urgency of necessity which gives a temporary right of protection in these cases, and this necessity cannot be measured or determined by general rules.

Notwithstanding the apparent justice of the principles above stated, they have not been universally acknowledged. It has even been maintained that the existing laws of the United States, which restrain the people of this country from setting on foot any warlike expeditions against the British government in Canada, pass beyond the strict line of our duty as a nation at peace with Great Britain, and that our neutrality would not be broken even if the government should countenance military expeditions from this country in aid of the insurgents. In support of this doctrine, the example of Great Britain is urged as directly in

point, in sending an army into Spain to settle the right to the throne of that kingdom. But it should be borne in mind that the war carried on in that country was a contest for the succession. The rival claimants were at war with each other, each assuming to be sovereign *de facto*. Great Britain was at peace with Spain, but when the crown was in controversy, she was at liberty to acknowledge either claimant, and to sustain his authority. In doing so her relations of peace with the kingdom remained undisturbed, but she was clearly at war with the party whose cause she so distinctly permitted her people to oppose with the military force of the nation. It would be idle to maintain that Don Carlos had not abundant cause of war, scarcely less so that he was not engaged in actual hostilities with Great Britain. If the United States should ever in like manner interfere in the future struggles of Great Britain and her colonies in support of the latter, she must be content to sustain the full weight of hostilities with Great Britain.

We continue to entertain the opinion expressed on a former occasion that the British government cannot be justified in the destruction of the Caroline. Even in a case less questionable, the right would not have been properly exercisable at the time, or in the manner adopted, without circumstances of discrimination. But there was no plea of necessity which could be admitted, nor had the government failed to perform its duties.

It cannot be urged, in justification of the aggression, that the Caroline was engaged in carrying munitions of war to the rendezvous of the insurgents. The government of the United States would have no authority to destroy the steamer for that cause, much less the authorities of Great Britain. The owner of the steamer was amenable to the laws of the United States, and if his property was liable to

forfeiture, he was entitled to the benefit of a full judicial investigation.<sup>1</sup>

S. F. D.

<sup>1</sup> In a speech delivered by Mr. Adams, at the late session of congress, that gentleman expresses the opinion that the proper inquiry in regard to this subject is, which party struck the first blow? which was guilty of the first unjustifiable act? The distinguished gentleman assumes that the steamer was a government vessel, or that the government was liable for the acts of those who were on board of her. But was this the case? She was not a government vessel. Nor, as it would seem, was the government responsible for her.

The question quoted from Moliere, *que diable faites vous au cot Galere?* might very well be put to the owner of the steamer, and it might be difficult for him to answer it in such a manner as to substantiate his claim to indemnity; but because his conduct was unjustifiable, it does not follow that the British government may properly resort to this mode of procedure against individuals who have violated the laws of the United States, nor that Great Britain may violate the territory of the United States.

If the crew of the steamer might have been regarded as a part of the belligerent force retiring into the United States, the boundary of a neutral, no right to go in quest of her results from the doctrine which we have stated from the publicists, unless the government of the neutral permitted the steamer to engage in unlawful enterprises; but this does not appear. If it could be shown that the owner of the steamer had violated the laws of the United States, the courts of the United States would have provided a remedy.

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#### ART. V.—THE BARRISTER.

[The following is reprinted from a little volume of *Essays* by Mr. Basil Montagu, a venerable member of the English bar, who has illustrated his long professional career, by various legal works, by the cultivation of letters, and by a blameless life. This character of the barrister, says the author, is "after the manner of Fuller."]

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##### SECTION I. — *His duty to himself.*

1. *Before he engages as a student he considers his health.*  
— whether it will enable him to encounter sedentary confinement, continued intensity of thought, the exertion of long and frequent pleadings in hot and crowded courts, and the anxiety ever attendant upon the consciousness of being intrusted with the happiness of others.

2. *He considers the fitness of his intellect for the profession of the law*, — whether he has invention to find, judgment to examine, memory to retain, and a prompt and ready delivery. He is mindful that a man may be miserable in the study of the law, who might have been serviceable to his country at the spade or the plough.

3. *He duly considers his motive for engaging in the profession*. — It is not fame, but honorable fame; it is not wealth, but wealth worthily obtained; it is not power, but power gained fairly and exercised virtuously; it is not the promising and pleasing thoughts of litigious terms, fat contentions, and flowing fees, but the heavenly contemplation of justice and equity. His plans will not be subservient to considerations of rewards, estate, or title; these will not have precedence in his thoughts, to govern his actions, but follow in the train of his duty.

He enters his profession, mindful of the admonition of lord Bacon. "We enter into a desire of knowledge, sometimes from a natural curiosity and inquisitive appetite; sometimes to entertain our minds with variety and delight; sometimes for ornament and reputation; sometimes to enable us to victory of wit and contradiction; and most times for lucre and profession; and seldom sincerely to give a true account of our gift of reason, for the benefit and use of man: — as if there were sought in knowledge a couch whereupon to rest a searching and restless spirit; or a terrace for a wandering and variable mind to walk up and down, with a fair prospect; or a tower of state for a proud mind to raise itself upon; or a fort or commanding ground for strife and contention; or a shop for profit or sale; and not a rich storehouse for the glory of the creator, and the relief of man's estate."

4. *He is careful of his health*. — He remembers that the foundation of happiness in life, and of excellence in his profession, is health of body. His rule, therefore, is *ne quid*



*minis.* He is warned by an eminent lawyer, who said, "I will not sit up more than three nights together for any attorney in London." He remembers the admonition of lord Bacon, "Although the world to a christian travelling to the land of promise be, as it were, a wilderness, yet that our shoes and vestments be less worn away while we sojourn in the wilderness, is to be esteemed a gift coming from divine goodness."

5. *He is industrious.* — "I have two tutors, said king Edward to Cardan, diligence and moderation." So our student will be on his guard against indolence, fickleness, irresolution, immoderate love of amusements, and against every ensnaring and dissipated habit; the natural effect of an overgrown, wealthy, and luxurious capital.

6. *He stores his mind with the general principles of law.* — The tutor to king Edward the sixth said, "I will not debase my royal pupil's mind with the nauseated and low crumbs of a pedant, but will ennoble it with the free and high maxims of a statesman. The stream must fail which is not supplied from the fountain."

Lord Bacon, in his entrance on philosophy, says: "And because the partitions of sciences are not like several lines that meet in one angle; but rather like branches of trees, that meet in one stem; which stem, for some dimension and space, is entire and continued, before it break and part itself into arms and boughs; therefore the nature of the subject requires, before we pursue the parts of the former distribution, to erect and constitute *one universal science*, which may be the mother of the rest; and that in the progress of sciences, a portion as it were, of the common highway may be kept, before we come where the ways part and divide themselves."<sup>1</sup>

<sup>1</sup> And in his entrance on the science of human nature, he thus speaks to the same effect:

"Now let us come to that knowledge, whereunto the ancient oracle di-

Our lawyer, therefore, studies the law of laws — “justitia universalis,”— the fixed poles, which, however the law may turn, stand immovable.

7. *He studies human nature.* — He remembers the maxim, “Pour diriger les mouvemens de la poupée humaine, il faudroit connoître les fils qui la meuvent.” He remembers the words of lord Bolingbroke: “I might instance, in other professions, the obligations men lie under of applying themselves to certain parts of history, and I can hardly forbear doing it in that of the law; in its nature the noblest and most beneficial to mankind, in its abuse and abasement the most sordid and the most pernicious. A lawyer now is nothing more, I speak of ninety-nine in a hundred at least, to use some of Tully’s words, ‘*nisi leguleius quidam cautus, et acutus, præco actionum, cantor formularum, auceps syllabarum* :’ but there have been lawyers that were orators, philosophers, historians : there have been Bacons and Clarendons. There will be none such any more, till in some better age, true ambition or the love of fame prevails over avarice; and till men find leisure and encouragement to prepare themselves for the exercise of this profession, by climbing up to the ‘vantage ground’ of science, instead of grovelling all their lives below, in a mean but gainful application to all the little arts of chicane. Till this happen,

recteth us, which is the knowledge of ourselves : which deserves the more accurate handling by how much it toucheth us more nearly. This knowledge is to man the end and term of knowledges ; but of nature herself, a portion only. And generally let this be a rule, that all divisions of knowledges be so accepted and applied, as that they may rather design forth and distinguish sciences into parts, than cut and pull them asunder into pieces ; that so the continuance and entireness of knowledges may ever be preserved. For the contrary practice hath made particular sciences to become barren, shallow, and erroneous, while they have not been nourished, maintained, and rectified, from the common fountain and nursery. So we see Cicero the orator complained of Socrates, and his school, that he was the first that separated philosophy and rhetoric ; whereupon rhetoric became a verbal, and empty art.”

the profession of the law will scarce deserve to be ranked among the learned professions: and whenever it happens, one of the vantage grounds to which men must climb, is metaphysical, and the other historical knowledge. They must pry into the secret recesses of the human heart, and become well acquainted with the whole moral world, that they may discover the abstract reason of all laws: and they must trace the laws of particular states, especially of their own, from the first rough sketches to the more perfect draughts; from the first causes or occasions that produced them, through all the effects, good and bad, that they produced."

8. *He studies the law which he is to practise, with due consideration of the law of other countries*, — and, that he may practise with effect, he is not unmindful that eloquence is to knowledge what colors are to a picture.

9. *He is careful of his times of recreation*. — He never forgets the old adage, "Tell me your amusements and I will tell you what you are." He knows that the employment of times of recreation, is susceptible of every variety between the lowest sensuality and the highest intellectual pleasures; between "the silence of Archimedes in his study, and the stillness of a sow at her wash;" between the drunken revelries of Jefferies, and the calm occupations of sir Matthew Hale.

"When a magistrate," says the author of the life of the chancellor de l'Hôpital, "returned to his family, he had little temptation to stir again from home. His library was necessarily his sole resource; his books his only company. To this austere and retired life, we owe the chancellor de l'Hôpital, the president de Thou, Pasquier, Loisel, the Pithous, and many other ornaments of the magistracy."

10. *When his name is up, his industry is not down*. — He does not think it virtuous to plead by his credit, but by his

study. This is the duty of the good advocate; but commonly physicians, like beer, are best when old; and lawyers, like bread, when they are new and young.

11. *He relies with confidence upon the power of industry and integrity.* — He does not doubt the truth of the old maxim, "Good counsellors never lack clients." Long suffering is a lesson in every part of our lives; in no part of life is it more necessary than in the arduous profession of the law: the greatest men it has produced have, at some period of their professional lives, been ready to faint at their long and apparently fruitless journey; and they would have fainted, had they not been supported by a confidence in the power of character and industry by which they broke out into light and glory at the last, exhibiting the splendid spectacle of great talents long exercised by difficulties, and high principles never tainted by any of the arts by which men sometimes become basely rich, or dishonorably great.<sup>1</sup>

<sup>1</sup> "I have heard it observed, that those men who have risen to the greatest eminence in the profession of law, have been in general such as had at first, an aversion to the study. The reason probably is, that to a mind fond of general principles, every study must be at first disgusting, which presents to it a chaos of facts apparently unconnected with each other. But this love of arrangement, if united with persevering industry, will at last conquer every difficulty; will introduce order in what seemed on a superficial view a mass of confusion, and reduce the dry and uninteresting detail of positive statutes into a system comparatively luminous and beautiful.

"The observation, I believe, may be made more general, and may be applied to every science in which there is a great multiplicity of facts to be remembered. A man destitute of genius may, with little effort, treasure up in his memory a number of particulars in chemistry or natural history, which he refers to no principle, and from which he deduces no conclusion; and from his facility in acquiring this stock of information, may flatter himself with the belief that he possesses a natural taste for these branches of knowledge. But they who are really destined to extend the boundaries of science, when they first enter on new pursuits, feel their attention distracted, and their memory overloaded with facts among which they can trace no relation, and are sometimes apt to despair entirely of their future progress. In due time, however, their superiority appears, and arises in part from that very dissatisfaction which they at first experienced, and which does not cease to stimulate their

12. *He considers how his profession may tend to warp his mind.* — He remembers the words of lord Bacon: "We every one of us have our particular den or cavern, which refracts and corrupts the light of nature; either because every one has his respective temper, education, acquaintance, course of reading and authorities, or from the difference of impressions, as they happen in a mind prejudiced or prepossessed, or in one that is calm and equal." As the divine, from constantly teaching, is in danger of being wise in his own conceit: the physician, from constantly seeing in an abject state, of losing his reverence for human nature; the soldier, of being ignorant, debauched, and extravagant; so against the idols of lawyers, moral and mental, our lawyer will be upon his guard.

13. *He is cautious that the indiscriminate defence of right and wrong does not lower his high sentiments, or weaken his love of truth.* — In the constitution of our courts, and of the courts in most, if not in all civilized countries, it has been deemed expedient, for the purpose of eliciting the truth, both of law and of fact, that the judge should hear the opposite statements of experienced men, who, in a public assembly, may be more able than the suitors, to do justice to the causes upon which their interests depend. A more efficacious mode to disentangle difficulty, to expose falsehood, and discover truth, was perhaps, never devised. It prevents the influence of passions, by which truth may be disturbed, and calls in aid every intellectual power by which justice may be advanced.

But however useful this practice may be for the protection of public justice, it is not without danger to the individual by whom it is practised. It has a tendency, unless counteracted by strength of mind and vigilance, to generate

inquiries, till they are enabled to trace, amidst a chaos of apparently unconnected materials, that simplicity and beauty which always characterize the operations of nature." — D. STEWART.

in him indifference to truth on other occasions ; and, when the distant prospect appears desirable, to induce him not to be very scrupulous as to the foulness of the road over which he has to pass to attain it.

14. *He does not suffer himself to be inflated by imaginary importance.* — Intrusted with the management of other men's concerns ; consulted and paid for advice ; living in private, or within the circle of men engaged in similar pursuits, have a tendency to inflate us into self-importance. Our lawyer, therefore, does not forget the hint given by Chaucer, in his description of the "serjeant at law" —

"No where so busy a man as he then was,  
And yet he seemed busier than he was."

Nor does he forget the lawyer in the novel, who was "hurried, and driven, and torn out of his life ; and repeated many times, that if he could cut himself in four quarters, he knew how to dispose of every one."

When Cromwell was displeased with sir Matthew Hale, for having dismissed a packed jury, and, on his return from the circuit, said to him, in anger, "You are not fit to be a judge ;" all the answer sir Matthew made was, "It was very true."

15. *His general caution is increased, if he has risen from an obscure situation.* — It is said that mud walls are apt to swell when the sun shines upon them. A quack struts with more solemnity than a regular physician.

16. *He is cautious not to form an improper estimate of the nature of power :* not to mistake what is of the earth earthy, for what is of the lord from heaven. — Power to do good is the true and lawful end of aspiring ; for good thoughts, though God accept them, yet towards men, are little better than good dreams, except they be put in act ; and that cannot be, without power and place as the vantage and commanding ground. Merit, and good works are the

end of man's motion ; and conscience of the same, is the accomplishment of man's rest ; for, if a man be partaker of God's theatre, he shall likewise be partaker of God's rest. *Et conversus Deus, ut aspiceret opera, quæ fecerunt manus suæ, vidit quod omnia essent bona nimis*, and then the Sabbath.

17. *He is vigilant that his profession may not contract his mind.* — True vision depends upon the power of contracting and dilating the sight. The elephant can rend a tree and pick up a pin. — Our lawyer, therefore, remembers that, if law has a tendency to quicken and invigorate the understanding, it may not have the same tendency to open and liberalize the mind.

18. *He does not imagine that knowledge is centred in the law.* — It is said, of a lawyer of the present times, that he used to boast of his never having opened any book but a law-book. The poor man is dead, and will be forgotten with his own pleadings.

Another celebrated lawyer, after a high encomium upon the powers displayed by Bacon in his reading on the statute of uses, says, — “What might we not have expected from the hands of such a master, if his vast mind had not so embraced within its compass the whole field of science, as very much to detract from professional studies !”

In the presentation-copy, by Bacon, to sir Edward Coke, of the “*Novum Organum*,” there is written by the hand of Sir Edward, under the handwriting of Bacon —

Auctori consilium,  
Instaurare paras, veterum documenta sophisma  
Instaura leges, justitiam que prius.

And, over the device of the ship passing between Hercules' pillars —

It deserveth not to be read in schools,  
But to be freighted in the ship of fools.

19. *He is cautious that his habitual attention to forms does not make him lose sight of the substance.* — In the year

1765, the important question with respect to the propriety of taxing America, as she was not represented in parliament, was discussed in the house of commons: the debate occupied the attention of the house for three successive days, and called forth all the ability of the country. At the conclusion of the third debate, at three o'clock in the morning, sir James Marriott, judge of the court of admiralty, rose. He said, "That upon this important subject he could not conscientiously give a silent vote, particularly as the question appeared to him, during the whole argument, to have been entirely mistaken; the question discussed had been with reference to the propriety of taxing America, as she was not represented; whereas, in truth and in fact, America was represented; for upon our first landing in America, we took possession of that continent as part and parcel of the manor of East Greenwich, in the county of Kent."

Upon hearing the witches in Macbeth say, "We are doing a deed without a name," a lawyer in the pit exclaimed, "Then it's not worth a farthing."

The lawyer in Hogarth insists that an elector who had lost his arm, cannot be sworn, as he cannot take the book in his hand.

20. *He does not suppose all his fellow-creatures under the influence of bad passions, from the effects of vice which he daily witnesses.* — Against this tendency lord Bacon warns students; saying, "As the fable goes of the basilisk, that if he sees a man first, the man dies; but if a man see him first, the basilisk dies; so it is with frauds, impostures, and evil arts; if a man discover them first, they lose their power of doing hurt; but if they prevent, then, and not otherwise, they endanger."

The young physician, when he attends the hospitals, sees the ruins of human nature: bodies laid up in heaps, like the bones of a destroyed town, *hominis precarii spiritus et male hærentis*, men whose souls seem borrowed, and kept there by



art and the force of medicine; whose miseries are so great, that few people have charity or humanity enough to visit them; or, visiting them, to do more than pity, in civility, or with a transient prayer: but the young man does not, from these sad scenes, infer that all men are thus afflicted. So, our lawyer does not, in his haste, say that all men are liars. When he assists in punishing the robbers, he does not forget the good Samaritan, who bound up the wounds of the way-faring man; and, when called upon to censure the sins of the woman at the feast, he is not unmindful that she may have her store of precious ointment to pour on the feet of her master.

## SECTION II. — *His duty to his client.*

1. In considering his duty to his client, he reflects upon the propriety of his acting: upon the person for whom he should act; and his mode of acting.

2. *He considers the principle upon which the profession of an advocate is founded.* — From our tendency to err, the utmost caution is requisite in the discovery of truth, both in the natural and moral world. "If," says lord Bacon, "you infer that the rays of celestial bodies are hot, because the rays of the sun excite heat, remember that the rays of the moon are cold. If you infer that the blood of animals is warm, because human blood is warm, remember that the blood of fish is cold. Examine, therefore, before you decide. Try all things; weigh all things. When the different sons of Jesse were brought before Samuel in the house, he asked for David, who was absent in the field."

If this caution ought, in general, to be observed in the discovery of truth, what vigilance must be requisite when deciding upon human conduct? Who can tell all the windings and turnings, all the hollownesses and dark corners of the mind? It is a wilderness in which a man may wander more than forty years, and through which few have passed

to the promised land. Wisdom, therefore, is always anxious to assist its own judgment by the opinions of others; "lord Bacon lit his torch at every man's candle."

Requisite as caution is, in forming a correct judgment upon human conduct in general, what difficulties attend the discovery of truth in a court of justice, amidst a conflict of passions endeavoring to mislead, and where sensibility is often least able to do justice to itself. When the general feeling of the public respecting the dilatoriness of the chancellor D'Aguesseau was respectfully communicated to him by his son, "My child," said the chancellor, "when you shall have read what I have read, seen what I have seen, and heard what I have heard, you will feel that if on any subject you know much, there may be also much that you do not know; and that something even of that you know may not, at the moment, be in your recollection. You will then, too, be sensible of the mischievous and often ruinous consequences of even a small error in a decision, and conscience, I trust, will then make you as doubtful, as timid, and consequently as dilatory, as I am accused of being." To aid the judge, therefore, in eliciting the truth, it has been deemed expedient, that he should hear the opposite statements of experienced men, who, in a public assembly, may be more able than the suitors to do justice to the causes upon which their interests depend.

3. *He examines the reasons in favor of and in opposition to this principle.* — That the judge should be assisted by hearing every reason which can be urged, appears indisputable. If a judge is called upon to decide on any doubtful question, in chemistry, for instance, would it not be desirable that he should hear the conflicting sentiments of the same chemist, or of two eminent chemists? Or in a doubtful question of insanity, to hear the opposite sentiments of the same physician, or of two eminent physicians? Opposite statements by the same individual is the process in our minds, and to

which, after having heard all and weighed all, we are obliged to resort; and it is a process not unknown in former times. When Alexander was feasting one night where Calisthenes was at the table, it was moved by some after supper, for entertainment sake, that Calisthenes, who was an eloquent man, might speak of some theme or purpose, at his own choice: which Calisthenes did; choosing the praise of the Macedonian nation for his discourse, and performing the same with so good manner, as the hearers were much ravished: whereupon Alexander, nothing pleased, said, "It was easy to be eloquent upon so good a subject." "But," saith he "turn your style, and let us hear what you can say against us:" which Calisthenes presently undertook, and did with that sting and life, that Alexander interrupted him, and said, "The goodness of the cause made him eloquent before, and despite made him eloquent again."

In the Harleian manuscripts in the British Museum, it is said that Elizabeth, queen of England, was a princess most entirely beloved of the people, for during her government pure justice and mercy did overflow in all courts of judicature. "And in this peerless queen's reign it is reported that there was but one serjeant at law at the common pleas bar (called serjeant Benlowes) who was ordered to plead both for the plaintiff and defendant, for which he was to take of each party ten groats only and no more; and to manifest his impartial dealing to both parties, he was therefore to wear a party-colored gown, and to have a black cap on his head, of imperial justice, and under it a white linen coyste, of innocence."

The statements by opposite advocates may not be most beneficial to the practitioner; and, as the advocate may profess feelings which he does not feel, and may support a cause which he knows to be wrong; as it is a species of acting without an avowal that it is acting, it may appear at variance with some of our best feelings. It is, however,

nothing but appearance. The advocate is in reality an officer assisting in the administration of justice, and acting under the impression that truth is elicited and difficulties disentangled by the opposite statements of able men. He is only troubling the waters, that they may exert their virtues.

4. *Satisfied with the principle upon which the profession of an advocate is founded, he enters on his duties.*

5. *He does not mix himself with the client or the cause, with the slanderer, the adulterer, the murderer, or the traitor, whom it may be his duty to defend. He lends his exertions to all; himself to none.*

6. *The result of the cause, except as far as he has an opinion of right, independent of the parties, is to him a matter of indifference.* It is for the court to decide: it is for him to argue.

7. *In general he does not exercise any discretion as to the suitor for whom he is to plead.* — If a barrister were permitted to exercise any discretion as to the client for whom he will plead, the course of justice would be interrupted by prejudice to the suitor, and the exclusion of integrity from the profession. The suitor would be prejudiced in proportion to the respectability of the advocate who had shrunk from his defence, and the weight of character of the counsel would be evidence in the cause. Integrity would be excluded from the profession, as the counsel would necessarily be associated with the cause of his client.

“From the moment,” says Erskine, in his defence of Thomas Paine, “that any advocate can be permitted to say that he will or will not stand between the crown and the subject arraigned in the court where he daily sits to practise, from that moment the liberties of England are at an end.”

“If the advocate refuses to defend, from what he may think of the charge or of the defence, he assumes the char-

acter of the judge; nay, he assumes it before the hour of judgment; and, in proportion to his rank and reputation, puts the heavy influence of, perhaps, a mistaken opinion, into the scale against the accused, in whose favor the benevolent principle of English law makes all presumptions, and which commands the very judge to be his counsel."

Our advocate, therefore, does not exercise any discretion; to him it is a matter of indifference, whether he appears for the most unfortunate, or the most prosperous member of the community; for the poorest bankrupt, or the noblest peer of the realm; for a traitor, or for the king.

8. *In some extreme cases he declines to act as advocate when the appearance of opposition is in violation of some of our best feelings.* — He will not, like *Lucius*, proceed in judgment against his own sons: —

"Infelix, utcumque ferent ea fata minores."

In these cases, before he acts or declines to act, he duly weighs his relative duties.

9. *He does not exercise any discretion, from his opinion of the goodness or badness of the cause.* — Burnet, in his life of sir Matthew Hale, says, "If he saw a cause was unjust, he for a great while would not meddle further in it, but to give his advice that it was so. If the parties after that would go on, they were to seek another counsellor, for he would assist none in acts of injustice. If he found the cause doubtful or weak in point of law, he always advised his clients to agree their business. Yet afterwards he abated much of the scrupulosity he had about causes that appeared at first view unjust: there once happened to be two causes brought to him, which, by the ignorance of the party, or their attorney, were so ill represented to him, that they seemed to be very bad, but he, inquiring more narrowly into them, found they were really very good and just. So after this he slackened much of his former strictness, of refusing

to meddle in causes upon the ill circumstances that appeared in them at first."

"But what do you think," said Mr. Boswell to Dr. Johnson, "of supporting a case you know to be bad?" Johnson: "Sir, you do not know it to be good or bad till the judge determines it. I have said that you are to state facts fairly; so that your thinking, or what you call knowing a cause to be bad, must be from reasoning, must be from your supposing your arguments to be weak and inconclusive. But, sir, that is not enough. An argument which does not convince yourself, may convince the judge to whom you urge it; and, if it does not convince him, why, then, sir, you are wrong, and he is right. It is his business to judge; and, you are not to be confident in your opinion that a cause is bad, but to say all you can for your client, and then hear the judge's opinion."

10. *He acts for the party by whom he is retained, as long as his services are required, and no longer; and, when no longer required, he may plead for his opponent.*—In the case of Mr. Shelly, argued in the court of chancery, a few years ago, all the king's counsel were retained against Mr. Shelly. In a cause, some years since, at Carlisle, between a peer and three orphan children of his steward, the peer retained every counsel at the bar; and he succeeded in retaining the property till his death, when it was returned with interest and costs by his noble successor. Our advocate knows that opulence does not possess this power to oppress its opponent, by sending one brief to a counsel at the commencement of a suit, and then rejecting him.

11. *He is ever ready to defend the accused; particularly if the accusation is a pretext to violate the rights and liberties of his countrymen.* If in the triumphant establishment of unwelcome innocence, he provokes the powerful he secures what is far better—his own approbation, and the love and respect of the virtuous. If ever the praises of

mankind are sweet, "if it is ever allowable to a christian to breathe the incense of popular favor, it is," says an eloquent divine, "when the honest, temperate, unyielding advocate, who has protected innocence from the grasp of power, is followed from the hall of judgment by the prayers and blessings of a grateful people."

12. *He is cautious in listening to the complaints of poverty*, knowing that true charity opens its eyes before it raises its hand; but when convinced that justice requires his exertions, he readily assists those who are unable to assist themselves, always with his time, his talents, and attention, and, when necessary, with his purse.

13. *He is anxious to prevent or terminate litigation.* — There are more differences settled in his chamber than in Westminster hall. Where the contest is a bubble blown up by malice, he endeavors to disperse it. He makes not a Trojan siege of a suit, but seeks to bring it to a set battle in a speedy trial.

14. *Before he enters the field he surveys his forces* : which consist of his knowledge; his integrity; his proper estimate of worldly power; his liberty of speech; the succour and sanctuary of a free press; and public sympathy. He knows that the administration of justice mainly depends upon the ability and integrity of the bar. Who, in times when our liberties are threatened, when power is attempting to extend its influence; who but men of ability can be expected to resist these invasions? Is it to be expected that the herd who follow any body that whistles to them, or drives them to pasture, will have the honesty and courage, upon such occasions, to despise all personal considerations, and to think of no consequences but what may result to the public from the faithful discharge of their sacred trust?

15. *He is diligent in discovering the merits of his client's case.* — He remembers the old adage, "They who are quick in searching, seldom search to the quick."

16. *If the cause be difficult, his diligence is the greater to find it out.* — If a leading case be out of his practice, he will take pains to trace it through the books, and prick the footsteps thereof, wheresoever he finds it.

17. *He never intentionally mistates either facts or law.* — “Sir Matthew Hale abhorred,” says Burnet, “these too common faults of mis-reciting evidence, quoting precedents or books falsely, or asserting things confidently, by which ignorant juries or weak judges are too often wrought on. He pleaded with the same sincerity that he used in the other parts of his life.”

18. *He exerts his power to strengthen his own case, and weaken his opponent's,* because he knows that, taking all things into consideration, justice is best promoted by collision of intellect, and that the whole truth will be eviscerated by the opposite counsel, or that the intelligence which presides will not permit truth to be misrepresented by any partial examination. We do not say, “What is truth?” and go out immediately.

19. *If he is obliged to arraign the acts of those in high station, he approaches them with the simplicity but with the courage of truth,* who is fabled to be white robed, because she can have no stain or tinge of malice.

20. *He is strenuous in the cause of his client: and, regardless of every obstacle, goes right onward in his course.* The hard-minded and mistaken Jefferies, said to Mr. Wallop, on Baxter's trial, “I observe you are in all these dirty causes, and were it not for you gentlemen of the long robe, who should have more wit and honesty than to uphold these factious knaves by the chin, we should not be at the pass we are at.” Similar language disgraced the bench on the trial of the seven bishops; but Mr. Hale and Mr. Somers were not likely to be deterred by such conduct from the discharge of their duties.

21. *In the discharge of his duty, he knows no fear.* —



When sir Matthew Hale, in the case of lord Craven, pleaded so forcibly for his client, that, in those miserable times, he was threatened by the then attorney general with the vengeance of the government, "I am pleading," he replied, "in defence of those laws which the parliament have declared they will maintain and preserve; I am doing my duty to my client, and I am not to be daunted." So our advocate has always the honesty and courage to despise all personal considerations, and not to think of any consequence but what may result to the public from the faithful discharge of his sacred trust.

SECTION III. — *His duty to the court.*

1. *He is ever mindful of the respect due to the court:* — whether it is the highest or lowest tribunal in the country, the house of lords, or the court of pie-poudre, it is the place where justice is administered and is a hallowed place.

"When baseness is exalted, do not bate  
The place its honor, for the person's sake,  
The shrine is that which thou dost venerate,  
And not the beast, that bears it on his back,  
I care not though the cloth of state should be  
Not of rich arras, but mean tapestry." — HERBERT.

2. *If insulted he is more sensible of the injury to good feeling than to himself.* — He is not so ignorant of human nature as not to expect haughtiness from the proud, contempt from the rich, ill manners from the vulgar, foolish talking and impertinence from the ignorant and conceited; — he does not expect to gather figs of thorns.

When Dr. Franklin came to England to implore the attention of our government to the representations made by America, he was ordered to attend at the privy council, where he was grossly insulted by Mr. Wedderburn; at the sallies of whose wit all the members of the council, except lord North, were in fits of laughter. A day or two after

he said to Mr. Lee, one of his counsel, "that to Mr. Wedderburn's conduct he was indifferent, but he was, indeed, sincerely sorry to see the lords of the privy council behave so indecently."

3. *If insulted by an equal, he does not forget the respect due to the court, but suppresses his feelings until he has retired.* — Shallow streams are agitated by the wind, deep streams flow on. He knows that this tranquillity may have the appearance of timidity, but he heeds it not. Alas, what is the appearance of any thing? The little birds perch upon the image of the eagle. *Quos ego — sed motos præstat componere fluctus*, is his feeling.

When the ecclesiastic insulted Don Quixote before the duke, the knight rose in indignation, but instantly said, "The place where I am, and the presence of the persons before whom I now stand, and the respect which I always have had and always shall have for men of your profession, tie up the hands of my just indignation."

4. *If a judge forget himself, and the infirmities of human nature appear through the ermine*, he laments that the charity of patience and the conduct of a gentleman should be found only in the advocate. He says with sir Edward Coke, "If a river swelleth beyond the banks, it soon loseth its own channel; but, if another punish me by doing what is wrong, I will not punish myself."

5. *If he forget himself and yield to anger, he does not suffer it to rankle in his mind.* — He remembers the anger of Hooker, which is said to have been like a phial of clear water, that, when shaken, beads at the top, but instantly subsides without soil or sediment of unkindness.

6. *He does not interfere after the judge has decided.* — He knows that perfection in the administration of justice consists in causes being fully heard, deeply considered, and speedily decided. When the cause has been fully heard, the advocate's duty is terminated. "Let not the counsel

at the bar," says lord Bacon, "chop with the judge, nor wind himself into the handling of the cause anew, after the judge hath declared his sentence."

SECTION IV. — *His duty to his profession.*

1. *Having shared the fruits, he endeavors to strengthen the root and foundation of the science of law.* — "I hold," says lord Bacon, "that every man is a debtor to his profession, from the which, as men do of course seek to receive countenance and profit, so ought they of duty to endeavor themselves, by way of amends, to be a help and ornament thereunto;" and sir Edward Coke, differing as he did from lord Bacon upon all subjects, except the advancement of their noble profession, expresses the same sentiment, almost in the same words. "If this," he says, "or any other of my works, may in any sort, by the goodness of Almighty God, who hath enabled me hereunto, tend to some discharge of that great obligation of duty wherein I am bound to my profession, I shall reap some fruits from the tree of life, and I shall receive sufficient compensation for all my labors."

2. *He resists injudicious attempts to alter the law.* — Knowing that zeal is more frequent than wisdom, that the meanest trade is not attempted without an apprenticeship, but every man thinks himself qualified by intuition for the hardest of all trades, that of government, he is ever ready to resist crude proposals for amendment: his maxim is "to innovate is not to reform."

Lord Bacon, zealous as he was for all improvement; believing, as he did, in the omnipotence of knowledge, that "the spirit of man is as the lamp of God, wherewith he searcheth the inwardness of all secrets;" and branding the idolaters of old times as a scandal to the new, says, "It is good not to try experiments in states, except the necessity be urgent, or the utility evident; and well to beware that it be the reformation that draweth on the change, and not

desire of change that pretendeth the reformation : that novelty, though it be not rejected, yet be always suspected ; and, as the scripture saith, ' that we make a stand upon the ancient way, and then look about us, and discover what is the straight and right way, and so to walk in it.' ”

3. *He does not resist improvement of the law.* — Tenacity in retaining opinion, common to us all, is one of lord Bacon's " Idols of the Tribe," and attachment by professional men to professional knowledge is an " Idol of the Den " common to all professions. " I hate the steamboat," said an old Greenwich pensioner ; " it's contrary to nature." Our advocate, therefore, is on his guard against this idolatry. He remembers that the lawyers, and particularly St. Paul, were the most violent opposers of christianity, and that the civilians, upon being taunted by the common lawyers with the cruelty of the rack, answered, " Non ex sævitiâ, sed ex bonitate talia faciunt homines." He does not forget the lawyer in the Utopia, who, when the archbishop of Canterbury, venerable for his age and learning, said, " Upon these reasons it is that I think putting thieves to death is not lawful," the counsellor answered, " That it could never take place in England without endangering the whole nation." As he said this, he shook his head, made some grimaces, and held his peace.<sup>1</sup>

<sup>1</sup> Pastoret, a French judge, who wrote on penal laws, " Je voudrais pouvoir défendre l'humanité sans accuser notre législation ; mais qu'est la loi positive auprès des droits immuables de la justice et de la nature ? Des magistrats même, je ne me le dissimule point, sont opposés aux réformes désirées par la nation entière. Nourris dans une connoissance intime de la jurisprudence pénale, ayant pour elle l'attachement si commun pour des idées anciennes, ils y sont encore attachés par un sentiment plus noble. Leur vertu a souvent adouci la sévérité de la loi, et elle leur rend chères des maximes qu'ils rendent meilleurs, en leur communiquant l'impression d'une ame tendre et vertueuse. Ce n'est pas eux qu'on doit craindre : ils finissent par être justes. Mais ce qu'on doit redoubter, parce qu'elle ne sait ni pardonner ni se corriger, c'est la médiocrité routinière, toujours prête à accabler de reproches ceux qui ont le courage d'élever leurs pensées et leurs observations au-dessus du niveau auquel elle

4. *He is aware that lawyers are not the best improvers of law.* — During a debate in the house of lords, June 13, 1827, lord Tenterden is reported to have said, "That it was fortunate that the subject (the amendment of the laws) had been taken up by a gentleman of an enlarged mind (Mr. Peel), who had not been bred to the law; for those who were, were rendered dull, by habit, to many of its defects."

And lord Bacon says, "*Qui de legibus scripserunt, omnes vel tanquam philosophi, vel tanquam jurisconsulti, argumentum illud tractaverunt. Atque philosophi proponunt multa dictu p[er]icula, sed ab usu remota. Jurisconsulti autem, suæ quisque patriæ legum (vel etiam Romanarum, aut Pontificiarum) placitis obnoxii et addicti, judicio sincero non utuntur, sed tanquam e vinculis sermocinentur. Certè cognitio ista ad viros civiles propriè spectat; qui optimè nòrunt quid ferat societas humana, quid salus populi, quid æquitas naturalis, quid gentium mores, quid rerum publicarum formæ diversæ; ideòque possint de legibus ex principiis et præceptis, tam æquitatis naturalis quàm politices, decernere.*"

5. *He resists erroneous modes of altering bad law.* — Lawyers have a tendency, instead of inquiring whether the principle of a law is right, to alter upon assumption that the principle is well founded. In 1809, sir Samuel Romilly proposed to alter the law in bankruptcy, by which a creditor has an arbitrary power to withhold his consent to the allowance of the certificate, because it was founded on an erroneous principle. The bill passed the commons, but was rejected in the lords, upon a proposal by lord Eldon,

est condamnée. Ce sont des novateurs, s'écrie-t-elle; c'est une innovation, répètent, avec un souris méprisant, les producteurs des idées anciennes. Tout projet de réforme est à leurs yeux l'effet de l'ignorance ou du délire, et les plus compatissans sont ceux qui daignent vous plaindre de ce qu'ils appellent l'égarement de votre raison. L'admiration pour ce qui est, pour ce qui fut, succède bientôt au mépris pour ce qu'on propose. Ils se croient plus sages que nos pères, ajoue-t-on; et avec ce mot, tout paroit décidé."

who was then chancellor, that the requisite number and value of signatures should be reduced from four-fifths to three-fifths.

About the same time, sir Samuel proposed that the law, by which the stealing to the amount of 5s. privately, in a shop, was punishable by death, should be altered; because it was framed upon an erroneous principle, as crime was not prevented by this imaginary calculation of consequences in the mind of the offender. It was suggested that the punishment ought not to be diminished, but the amount of the goods stolen increased.

In various of the acts for the relief of insolvent debtors, which passed to mitigate the severe operation of arbitrary imprisonment for debt, the reason assigned in the preamble was, that *the gaol was too full*: viz., 6 Geo. III. c. 70. "Whereas, notwithstanding the great prejudice and detriment which occasional acts of insolvency may produce to trade and credit, it may be expedient, in the present condition of the prisons and goals in this kingdom, that some of the prisoners who are now confined should be set at liberty: be it, &c.:" and in May, 1827, it was proposed to parliament to alter the law for arrest on mesne process to the sum of 20l.

Our advocate, therefore, resists such attempts, which, instead of meeting, perpetuate the evil, which

"Keep the word of promise to our ear,  
And break it to our hope."

6. *He assists in the improvement of the law.* — While he is in doubt, he endeavors to improve himself; but after patient and successful travail after truth, he diffuses the knowledge which he has obtained. Having in the beginning consulted Argus with his hundred eyes, he now trusts to Briareus with his hundred hands.

7. *He is not deterred from assisting in the improvement of the law by the fear of worldly injury*; — neither in general

conduct nor in particular emergencies, are his plans subservient to considerations of rewards, estate, or title: these have not precedence in his thoughts, but follow in the train of his duty. He says, with sir Samuel Romilly, "It is a common, and may be a convenient mode of proceeding, to prevent the progress of improvement, by endeavoring to excite the odium with which all attempts to reform are attended. Upon such expedients it is scarcely necessary for me to say, that I have calculated. If I had consulted only my own immediate interests, my time might have been more profitably employed in the profession in which I am engaged. If I had listened to the dictates of prudence, if I had been alarmed by such prejudices, I could easily have discovered that the hope to amend law is not the disposition most favorable for preferment. I am not unacquainted with the best road to attorney-generalships and chancellorships: but in that path which my sense of duty dictates to be right, I shall proceed; and from this, no misunderstanding, no misrepresentation, shall deter me."

8. *He is not deterred from endeavoring to improve the law by the censure ever attendant upon attempts to reform.* — He knows that the multitude will cry out for Barabbas, and that ignorance has an antipathy to intellect.

"'Tis a rich man's pride, there having ever been  
More than a feud, a strange antipathy  
Between us and true gentry."

He knows this, but proceeds, secure of his own approbation, and the sympathy of the virtuous and intelligent.

9. *If the principle of the law is erroneous, he endeavors to extirpate it with its attendant injustice and litigation.* — If the principle of the laws against usury or witchcraft or widows burning themselves, are erroneous, he endeavors to procure their repeal. In these cases he remembers the maxim of sir Edward Coke: "Si quid moves à principio moveas; errores ad principia referre est refellere." He re-

members the old maxim : " He who in the cure of politic or of natural disorders shall rest himself contented with second causes, without setting forth in diligent travel to search for the original source of evil, doth resemble the slothful husbandman, who moweth down the heads of noisome weeds, when he should carefully pull up the roots ; and the work shall ever be to do again."

10. *If the principle is right, he endeavors to modify it, according to times and circumstances.* — If the principle of the laws against usury is well founded, he varies the rate of interest ; or in witchcraft he mitigates the severity of the punishment.

In these cases he remembers the admonition of sir Matthew Hale ; " We must do herein, as a wise builder doth with a house that hath some inconveniences, or is under some decays. Possibly here or there a door or a window may be altered, or a partition made ; but, as long as the foundations or principles of the house be sound, they must not be tampered with. The inconveniences in the law are of ~~such~~ a nature, as may be easily remedied without unsettling the frame itself ; and such amendments, though they seem small and inconsiderable, will render the whole fabric much more safe and useful."

11. *If there is any temporary cause to lower the character of the profession, he exposes it. — If there is any permanent cause he endeavors to counteract it.* — As the advancement of learning has a tendency to divert from action and business to leisure and privateness, the pleasures of intellect being preferable to the pleasures of wealth and ambition, he endeavors to inculcate the true doctrine, that men, instead of deserting their colors, ought to unite contemplation and action, " a conjunction like unto that of the two highest planets — Saturn, the planet of rest and contemplation, and Jupiter, the planet of civil society and action ; " but he does not forget that Jupiter dethroned Saturn.



12. *If he is advanced to any office of authority, he uses his power to improve the law.* — Sir Francis Bacon was no sooner appointed attorney-general than he dedicated to the king his proposals for compiling and amending the laws of England. "Your majesty," he says, "of your favor, having made me privy-councillor, and continuing me in the place of your attorney-general, I take it to be my duty, not only to speed your commandments and the business of my place, but to meditate and excogitate of myself, wherein I may best, by my travails, derive your virtues to the good of your people, and return their thanks and increase of love to you again; and after I had thought of many things, I could find, in my judgment, none more proper for your majesty as a master, nor for me as a workman, than the reducing and recompiling of the laws of England:" and having traced the exertions of different legislators from Moses to Augustus, he says, "Cæsar, si ab eo quæreretur, quid egisset in togâ; leges se respondisset multas et præclaras tulisse;" and his nephew Augustus did tread the same steps, but with deeper print, because of his long reign in peace; whereof one of the poets of his time saith,

"Pace data terris, animum ad civilia vertit  
Jura suum; legesque tulit justissimus auctor."

So too, sir Samuel Romilly was no sooner promoted to the office of solicitor-general than he submitted to parliament his proposals for the improvement of the bankrupt law and the criminal law. "Long," he says, "has Europe been a scene of carnage and desolation: a brighter prospect has now opened before us,

— "Peace hath her victories,  
Not less renown'd than war."

13. *He now retires, but not unmindful of the precept, "Let no man be hasty to eat of the fruits of Paradise before his*

time." He retires, after a life of labor and industry, to enjoy his well-earned leisure,

"To taste of deep philosophy,  
Wit, eloquence, and poesy ;"

to the innocent pleasures of social mirth, to the nobler warmth of social virtue, to the advancement of merit, the promotion of justice, and the constant exercise of faith, hope, and charity.

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#### ART. VI.—THE MADISON PAPERS.

*The Papers of James Madison, purchased by order of Congress ; being his Correspondence and Reports of Debates during the Congress of the Confederation and his Reports of Debates in the Federal Convention ; now published from the original manuscripts, deposited in the Department of State, by direction of the Joint Library Committee of Congress, under the superintendence of HENRY D. GILPIN. In three volumes. Washington: Langtree & O'Sullivan, 1840.*

THESE papers were probably designed by Mr. Madison to be his contribution towards the civil history of the United States. The constitution of the United States is in the history of politics, a miracle. Nothing of the kind had ever been produced, which, in view of its importance, or its success, could be placed in comparison with it. Mr. Madison seems all along to have had a prophetic insight into the relative importance of this portion of our revolutionary history, and to have foreseen that the time would come, when the military events which led the way to American independence would find their proper level, and curiosity

would be directed to the more valuable and interesting portions of history. Cicero's "*cedant arma togæ*," though poor poetry, is nevertheless good sense and good philosophy; and now that military enthusiasm, and the blind admiration of military prowess and achievement, have been somewhat tempered and chastened by the spirit of christian civilization, a more earnest attention is given to those less prominent facts, which really determine and characterize the progress of humanity.

The declaration of independence has been chosen by Mr. Madison as the starting point. The original draft of the declaration of independence, with the alterations made by congress, and the debates in congress, together with the debates on two of the articles of confederation, were furnished by Mr. Jefferson, and are placed at the beginning of the first volume; the remainder of which, together with a portion of the second volume, is occupied by sketches of the debates in congress, between the time of the declaration of independence and the meeting of the convention for the formation of the constitution, and by extracts from the correspondence of Mr. Madison during the same period, and illustrative of the debates. The second and third volumes contain the journal of the convention, preceded by an introductory sketch of the state of affairs which led to its formation, and a history of the circumstances attending its meeting.

There is certainly no event connected with American history of more importance than the formation of the present constitution of the United States, and these contributions of Mr. Madison towards its history have been waited for with intense curiosity. It is probable, that, in this case, as in most other similar cases, expectation will not be fully realized, for it has been to some extent not founded in reason. The constitution of the United States did not grow up during the session of the convention, nor yet during the period which elapsed between the declaration of indepen-

dence and the convention. It was not an artificial structure invented by the genius of the patriot statesmen of the convention; it was not a government machine scientifically put together by the rules of art, and constructed as one might construct a steam engine; it was and is the representation of the political and moral condition of the people of the United States, at the time of its adoption; and herein is to be found the secret of its strength and of its endurance. Many were the systems and various were the plans of government presented by the brilliant and inventive genius of some of the members of the convention. On paper they appear perfect, and perhaps justify, when compared with the form of government actually adopted, the depreciating remarks which have sometimes been made concerning it. But the practical tact and sagacity of the framers of the constitution were not for a moment confused by these appearances of beauty and system, nor ever led astray by the false lights of theoretical perfection. With unerring insight, they saw at a glance how much of each plan would do for the people of America, and without struggling in vain for a form of government which should look symmetrical and perfect on paper, they were satisfied to adopt a practicable one. The constitution as it now stands is often said to be the result of a compromise of opposing views, theories, and interests; and doubtless in some of its mechanism it is so. But in all its most vital parts, it was rather the result of the highest practical wisdom selecting from all the results of experience and invention, that which was under the circumstances possible, and leaving all that was merely beautiful in speculation, or perfect in theory, to go its way to the limbo of vanity. The constitution of England has grown up with the English nation. Unlike those European governments, which, springing out of the ruins of the Roman empire, were fast moored to the despotic ideas of the Roman law, the English con-

stitution always had a power of adaptation; an elasticity which enabled it to take, slowly perhaps, the shape and form of the English character, as it changed from day to day, and so to grow up to be a tolerably perfect representation of English civilization. The framers of our constitution had the address and the wisdom, which enabled them to create out of the elements, for America, what the silent growth of ages had given birth to for England. The history of our constitution is then the history of the social and moral growth of the American people. It is in vain to expect to trace its whole growth in the journals of a convention. You might as well seek to trace every change which the majestic oak has undergone, since its embryo first appeared in the acorn, till its roots have been thrust deep into the earth and its branches have spread above, victorious over a thousand storms.

It is for this reason, that, he who seeks in the "*Madison Papers*," for a complete illustration of the origin and growth of the constitution, will be disappointed. But he will not therefore slight what he can get, because he cannot get all. A moment's reflection will satisfy him, that the small period in its history which these documents embrace is a period of intense interest, and worthy of his profound consideration.

The declaration of independence was the first decided step. What had gone before had been the essays of childhood, feebly endeavoring to advance, tottering and weak. The declaration of independence was the stride of early manhood, planting its foot firmly, never to be driven back. It was indeed a bold step; it succeeded because it was in harmony with the wishes of the American people. It was argued in favor of the "declaration," that it was the will of the people, that they were the strength of the congress, and their will must be the law.

Mr. Madison has given us, by the help of Mr. Jefferson, a

copy of the original draft of this famous document, together with the alterations and emendations which were made before its final adoption by congress. It has been said that Mr. Jefferson rather winced under the discussion which his handiwork underwent in congress before it finally took the shape in which it went forth to the world. In its first form, as it came from Mr. Jefferson's hands, it was doubtless a magnificent production of genius; but we cannot help thinking that the alterations which it underwent were also improvements. The paper, as it came from the hands of its original author, has not so much of the dignity of a great state paper as that which came from congress, and in several instances its comprehensiveness and force were improved by slight alterations in the modes of expression.

But it was not enough to have declared themselves independent. The people of the British colonies had something farther to do. It is said that it takes two to make a bargain. There was another party to be consulted now. While the colonists were declaring themselves independent, the king of the most powerful nation in the world was calling them his subjects; and the people of England, indulging in a fancied superiority over provincials, seemed ready to join their rulers in riveting the chains of their brethren. Independence was not to be secured by word alone. There were blows to be given and taken too. It was seen that nothing but union of efforts could enable the colonists to sustain themselves on the ground they had taken, and accordingly the views of the leaders were immediately directed towards a confederation. The outlines of a plan had indeed long before been drawn and submitted to the consideration of the continental congress, by Dr. Franklin. His scheme embraced a plan of perpetual confederation for national purposes. These may perhaps be called the two fundamental principles of American union. It was to be for national objects, and it was to be perpetual.

Dr. Franklin's scheme was not immediately adopted. But as soon as the determination to form a separate nation had been adopted, the idea was again taken up, and a confederation, based upon the plan of Dr. Franklin, was proposed and finally adopted. It is worthy of remark, that up to the adoption of the articles of confederation, each of the colonies or states seemed by tacit consent to be considered as sovereign and independent. Whatever may be said in the way of reasoning on this matter, this seems to have been at the time admitted as a fact. In the continental congress, the votes were, as a matter of course, taken by states, and not *per capita*. It was never for a moment pretended that there was then any national power over-riding the whole. The continental congress was a revolutionary institution deriving its authority from the assent of the several states, and pretending to nothing more. But the articles of confederation were perpetual and for national purposes. If we can understand the effect of this union, it was to make the thirteen united colonies one nation. The confederation was perpetual, and nothing but the *ultima ratio* of revolution or conquest could ever sever any portion of the nation from the rest. The letters and debates in the first volume of the Madison papers are full of interesting matter on the subject of the confederation. The grand difficulties were representation and taxation. The small states were afraid to give up their separate nationality and to be merged in the whole nation, and desired that their independence might be recognised and secured by an equal vote in congress; while the larger states maintained, and with no small show of reason, that representation and taxation ought to go together, and that if the states voted equally they ought to pay equally. The matter of representation was finally settled by giving to each state an equal vote. But the matter of taxes was not so easily arranged. It was finally settled by the articles of the confederation, that the respective proportions

of each state should be adjusted by a valuation of the lands. Many a long and weary debate did congress have in endeavoring to reduce to practice this impracticable scheme. It was certain that such a valuation could not be obtained, without the intervention of the state authorities, and it was taken for granted that the state authorities could never be relied on to execute the task honestly if they undertook it. On one occasion, when congress had been discussing the proposition for referring the valuation to the states, Mr. Dyer proposed that a proviso should be added, "that the states should cheat equally." It is not too much to say that the conduct of many of the states, when, at the close of the war, congress endeavored to provide for the fulfilment of the national obligations and the payment of the national creditors, by means of requisitions and schemes of permanent revenue, fully justifies all the fears of a want of good faith, which were so strongly expressed by many of the members of congress. The same mean spirit of sectional jealousy, which still so often shows itself and seems to pervert the conscience and sense of justice of the states, was, if possible, still stronger then than now. In fact there was more then to justify—we should rather say excuse and extenuate it. But even now, when the experience of half a century has so largely shown that the great interests of the union are and ever must be identified with the welfare of all the parts, there are still not wanting small politicians, who seek, by their affected jealousy in behalf of local interests, to secure to themselves a small popularity among small men.

The letters of Mr. Madison, written at this time, are all inspired by the spirit of true patriotism. He had been so long a participator in the national councils,—had so long viewed the united colonies as one nation,—had identified himself so completely with the national interests, and saw so clearly how dependent each of the states must ever be for pro-



tection and support upon a union of the whole, that his predominant feeling was a large and liberal nationality. True, he never for a moment forgot that he was a delegate from Virginia, and true to his democratic principles, he was ever conscientious in his endeavor to follow and obey the instructions of his constituents; but he would never sacrifice on the altar of personal popularity, and sectional interest, the faith and honor of the statesman.

It is not, however, our present purpose to indulge in speculations and theories. Our readers can speculate and theorize for themselves, but they cannot all have access to the Madison Papers, and we are sure that we cannot do a more acceptable service to them, than by presenting them with a few extracts from different portions of the work. The first letter is dated March 27, 1780. Nearly four years had passed since the declaration of independence, and the war was yet raging, the national resources apparently exhausted, and the prospect dark and cheerless. Listen to the calm, clear, but not despairing voice, of the patriot-statesman.

*"To Thomas Jefferson."*<sup>1</sup>

"Dear Sir — Nothing under the title of news has occurred since I wrote last week by express, except that the enemy on the first of March remained in the neighborhood of Charleston, in the same posture as when the preceding account came away. From the best intelligence from that quarter, there seems to be great encouragement to hope that Clinton's operations will be again frustrated. Our great apprehensions at present flow from a very different quarter. Among the various conjunctures of alarm and distress which have arisen in the course of the revolution, it is with pain I affirm to you, sir, that no one can be singled out more truly critical than the present. Our army threatened with an immediate alternative of disbanding or living on free quarter; the public

<sup>1</sup> Then Governor of Virginia.

treasury empty ; public credit exhausted, nay, the private credit of purchasing agents employed, I am told, as far as it will bear ; congress complaining of the extortion of the people ; the people of the improvidence of congress ; and the army of both ; our affairs requiring the most mature and systematic measures, and the urgency of occasions admitting only of temporizing expedients, and these expedients generating new difficulties. Congress recommending plans to the several states for execution, and the states separately rejudging the expediency of such plans, whereby the same distrust of concurrent exertions that has damped the ardor of patriotic individuals must produce the same effect among the states themselves ; an old system of finance discarded as incompetent to our necessities, an untried and precarious one substituted, and a total stagnation in prospect between the end of the former and the operation of the latter. These are the outlines of the picture of our public situation. I leave it to your own imagination to fill them up. Believe me, sir, as things now stand, if the states do not vigorously proceed in collecting the old money, and establishing funds for the credit of the new, that we are undone ; and let them be ever so expeditious in doing this, still the intermediate distress to our army, and hindrance to public affairs, are a subject of melancholy reflection. General Washington writes that a failure of bread has already commenced in the army ; and that, for anything he sees, it must unavoidably increase. Meat they have only for a short season ; and as the whole dependence is on provisions now to be procured, without a shilling for the purpose, and without credit for a shilling, I look forward with the most pungent apprehensions. It will be attempted, I believe, to purchase a few supplies with loan-office certificates ; but whether they will be received is perhaps far from being certain ; and if received will certainly be a most expensive and ruinous expedient. It is not without some reluctance I trust this information to a conveyance by post, but I know of no better at present, and I conceive it to be absolutely necessary to be known to those who are most able and zealous to contribute to the public relief."

The grand difficulty of modern statesmanship — finding

money — occupied of course much of the thoughts of the revolutionary statesmen. The following extract will be interesting.

“As you are at present a *legislator*, I will take the liberty of hinting to you an idea that has occurred on this subject. I take it for granted that taxation alone is inadequate to our situation. You know as well as I do, how far we ought to rely on loans to supply the defect of it. Specific taxes, as far as they go, are a valuable fund, but from local and other difficulties will never be universally and sufficiently adopted: purchases with state money or certificates will be substituted. In order to prevent this evil, and to ensure the supplies, therefore, I would propose, that they be diffused and proportioned among the people as accurately as circumstances will admit; that they be *impressed* with vigor and impartiality; and paid for in certificates not transferable, and to be redeemable, at some period subsequent to the war, at specie value, and bearing an intermediate interest. The advantage of such a scheme is this, that it would anticipate during the war the future revenues of peace, as our enemies and all other modern nations do. It would be compelling the people to *lend* the public their commodities, as people elsewhere lend their money to purchase commodities. It would be a permanent resource by which the war might be supported as long as the earth should yield its increase. This plan differs from specific taxes in this, that as an equivalent is given for what is received, much less nicety would be requisite in apportioning the supplies among the people, and they would be taken in places where they are most wanted. It differs from the plan of paying for supplies in state emissions or common certificates, in this, that the latter produce all the evils of a redundant medium, whereas the former, not being transferable, cannot have that effect, and moreover do not require the same degree of taxes during the war.”

Money is indeed the sinews of war; witness the following extract:

“Congress has just finished an estimate of supplies for the en-

suing year, requiring of the states the value of six millions of dollars in specie. The principal part of the requisition consists of specific articles, the residue of specie or the new emissions, receivable as specie. If the states fulfil this plan punctually, there is no doubt that we shall go smoothly through another campaign; and if they would forbear recurring to state emissions and certificates, in procuring the supplies, it may become a permanent and effectual mode of carrying on the war. But past experience will not permit our expectations to be very sanguine. The collection and transportation of specific supplies must necessarily be tedious and subject to casualties; and the proceedings of separate popular bodies must add greatly to the uncertainty and delay. The expense attending the mode is of itself a sufficient objection to it, if money could by any possible device be provided in due quantity. The want of this article is the source of all our public difficulties and misfortunes. One or two millions of guineas properly applied would diffuse vigor and satisfaction throughout the whole military departments, and would expel the enemy from every part of the United States. It would also have another good effect. It would reconcile the army and everybody else to our republican forms of government; the principal inconveniences which are imputed to them being really the fruit of defective revenues. What other states effect by money, we are obliged to pursue by dilatory and indigested expedients, which benumb all our operations, and expose our troops to numberless distresses. If these were well paid, well fed, and well clothed, they would be well satisfied, and would fight with more success. And this might and would be as well effected by our governments as by any other, if they possessed money enough, as in our moneyless situation the same embarrassments would have been experienced by any government."

Mr. Madison seems to have well understood the difference between money and a credit currency — a difference which too many grand financiers are so slow to see, and the neglect of which is every day bringing so much misery upon our country.

"Dear Sir — I am glad to find you have at last got a house of delegates, and have made so auspicious a beginning, as an unanimous vote to fill up our line for the war. This is a measure which all the states ought to have begun with. I wish there may not be some that will not be prevailed on even to end with it. It is much to be regretted, that you are not in a condition to discontinue another practice equally destructive with temporary enlistments. Unless an end can by some means or other be put to state emissions and certificates, they must prove the bane of every salutary regulation. The depreciation in this place has lately run up as high as one hundred for one, and it cannot be satisfactorily accounted for, on any other principle than the substitution of certificates in the payment of those taxes which were intended to reduce its quantity and keep up a demand for it. The immediate cause of this event is said to have been the sudden conversion of a large quantity of paper into specie, by some tories lately ordered into exile by this state. It is at present on the fall, and I am told the merchants have associated to bring it down and fix it at seventy-five. The fate of the new money is as yet suspended. There is but too much reason, however, to fear that it will follow the fate of the old. According to the arrangement now in force, it would seem impossible for it to rise above one for forty. The resolutions of congress which establish that relation between the two kinds of paper, must destroy the equality of the new with specie, unless the old can be kept down at forty for one. In New Jersey, I am told, the legislature has lately empowered the executive to regulate the exchange between the two papers, according to the exchange between the old and the new, in order to preserve the equality of the latter with specie. The issue of this experiment is of consequence, and may throw light perhaps on our paper finance. The only infallible remedy, whilst we cannot command specie, for the pecuniary embarrassments we labor under, will, after all, be found to be a punctual collection of the taxes required by congress."

Mr. Madison is understood to have been one of the champions of state rights. Hear what he says to Mr. Jefferson.

“Dear Sir — The inclosed paper is a copy of a report, from a committee, now lying on the table of congress for consideration. The delicacy and importance of the subject makes me wish for your judgment on it, before it undergoes the final decision of congress.

“The necessity of arming congress with coercive powers arises from the shameful deficiency of some of the states which are most capable of yielding their apportioned supplies, and the military exactions to which others, already exhausted by the enemy and our own troops, are in consequence exposed. Without such powers, too, in the general government, the whole confederacy may be insulted, and the most salutary measures frustrated, by the most inconsiderable state in the union. At a time when all the other states were submitting to the loss and inconvenience of an embargo on their exports, Delaware absolutely declined coming into the measure, and not only defeated the general object of it, but enriched herself at the expense of those who did their duty.

“The expediency, however, of making the proposed application to the states, will depend on the probability of their complying with it. If they should refuse, congress will be in a worse situation than at present; for as the confederation now stands, and according to the nature even of alliances much less intimate, there is an implied right of coercion against the delinquent party, and the exercise of it by congress, whenever a palpable necessity occurs, will probably be acquiesced in.

“It may be asked, perhaps, by what means congress could exercise such a power, if the states were to invest them with it. As long as there is a regular army on foot, a small detachment from it, acting under civil authority, would at any time render a voluntary contribution of supplies due from a state, an eligible alternative. But there is a still more easy and efficacious mode. The situation of most of the states is such, that two or three vessels of force employed against their trade will make it their interest to yield prompt obedience to all just requisitions on them. With respect to those states that have little or no foreign trade of their own, it is provided that all inland trade with such states as supply

them with foreign merchandise may be interdicted, and the concurrence of the latter may be enforced, in case of refusal, by operations on their foreign trade.

\* There is a collateral reason which interests the states who are feeble in maritime resources, in such a plan. If a naval armament was considered as the proper instrument of general government, it would be both preserved in a respectable state in time of peace, and it would be an object to man it with citizens, taken in due proportions, from every state. A navy so formed, and under the orders of the general council of the state, would not only be a guard against aggressions and insults from abroad, but, without it, what is to protect the southern states, for many years to come, against the insults and aggressions of their northern brethren ? ”

It is plain that Mr. Madison's regard for state rights never made him forget the rights of the nation. He had been long enough engaged in public affairs in trying times, to see and know that the first element of happiness at home, and respectability abroad, was a preservation of state rights within their proper limits, and an entire national supremacy in national concerns.

The following letter shows farther the opinions of Mr. Madison, and is interesting, as containing perhaps the germ of the peculiar and efficient element of the present constitution, the application of national authority to individuals.

“ Dear Sir — The two circumstances relating to the proposed duty on trade, mentioned in your favor of the first instant, were subjects of discussion when the measure was on the anvil. It was evident that the disposition of the states to invest congress with such a power would be influenced by the length of the term assigned for the exercise of it. It was equally evident that no provision would satisfy the present creditors of the United States, or obtain future loans, that was not commensurate to all the public engagements. In order to reconcile these points, the duration of the impost was limited, but limited in so indefinite a manner as not to defeat the object of it. Should the increase of trade render

the duty more productive than was estimated, it must the sooner extinguish the public debts, and cease. The application of congress for such a power supposes, indeed, a confidence in them, on the part of the states, greater perhaps than many may think consistent with republican jealousy ; but if the states will not enable their representatives to fulfil their engagements, it is not to be expected that individuals either in Europe or America will confide in them. The second objection you mention was also a subject of much discussion in congress. On one side it was contended that the powers incident to the collection of a duty on trade were in their nature so municipal, and in their operation so irritative, that it was improbable that the states could be prevailed on to part with them ; and that, consequently, it would be most prudent to ask from the states nothing more than the duty itself, to be collected by state officers, and paid to a continental receiver ; and not the right of collecting it by officers of congress. On the opposite side it was urged, that as congress would be held responsible for the public debts, it was necessary, and would be expected, that the fund granted for discharging them should be exclusively and independently in their hands ; that if the collectors were under the control of the states, the urgency of their wants would be constantly diverting the revenue from its proper destination ; that if the states were willing to give up the thing itself, it was not likely they would cavil at any form that would be most effectual ; that the term proposed might be reconciled with their internal jurisdictions, by annexing to the office of collector all the powers incident thereto, and leaving to congress the right of appointing the officers. How far it may be best to appoint the established naval officers, I am not prepared to say ; but should that be found to be the case, they will exercise their new functions, not as naval officers of the state, but as invested with a separate commission by congress, in such manner, that in the former respect they are wholly exempt from the jurisdiction of congress, and in the latter from that of the state. Such a junction of powers, derived from different sources, in the same person, certainly has its inconveniences, but there will be many instances of it in our complex



government. I have met with so many interruptions this morning, that I fear I may have not done justice to the subject in my explanation of it. Another consequence is, that I must be very brief on the head of intelligence to make sure of the post."

Nothing is more remarkable than the calmness and dignity which pervade these letters. Every thing which could harass and vex a legislative body seems to have been in operation to harass and vex the congress of which Madison was a member. Yet not a single intemperate or overzealous expression has escaped from him. Every word breathes the repose of conscious strength and conscious right. But prosperous events sometimes came. His letters show, that, if he could bear adversity, the far more difficult trials of prosperity were not too much for him. Hear what he says about the surrender of Cornwallis.

"Dear Sir — I return you my fervent congratulations on the glorious success of the combined arms at York and Gloucester. We have had from the commander in chief an official report of the fact, with a copy of the capitulation, and a general intimation that the number of prisoners, excluding seamen, &c., would exceed five thousand; but no detail of our gains. If these severe doses of ill fortune do not cool the phrenzy and relax the pride of Britain, it would seem as if Heaven had in reality abandoned her to her folly and her fate. This campaign was grounded on the most intense exertion of her pecuniary resources. Upwards of twenty millions were voted by the parliament. The king acknowledged that it was all he asked, and all that was necessary. A fair trial has then been made of her strength; and what is the result? They have lost another army, another colony, another island, and another fleet of her trade; their possessions in the East Indies, which were so rich a source of their commerce and credit, have been severed from them, perhaps forever; their naval armaments, the bulwarks of their safety, and the idols of their vanity, have in every contest felt the rising superiority of their enemies. In no points have they succeeded, except in the predatory con-

quest of Eustatia, of which they have lost the greatest part of everything except the infamy, and in the relief of Gibraltar, which was merely a negative advantage. With what hope or with what view can they try the fortune of another campaign? Unless they can draw succour from the compassion or jealousy of other powers, of which it does not yet appear that they have any well-founded expectation, it seems scarcely possible for them much longer to shut their ears against the voice of peace."

But our extracts from the correspondence are already getting too extensive. Let us turn to the journal of the convention. The design of Mr. Madison seems to have been to give an accurate statement of the substance of the debates, excepting in a few cases, where he appears to have intended to give an accurate report of the speeches. One thing is certain. If the journal of Mr. Madison is, as we believe it to be, correct, the world has rarely, if ever, seen so business-like a body of men as this convention. They were evidently intent upon the matter in hand; not bent upon showing off their eloquence or ingenuity; much less upon wasting and wearing away the time in long speeches, for the benefit of their constituents. It is surprising, too, to see how calmly the deliberations were carried on, and how little of passion and irritation was allowed to be mixed up with them. Certainly men were there of strong passions and vigorous impulses, but it would seem as if all violence of feeling and expression had been chastened and subdued by the greatness of the occasion. There were doubtless some hard words given, and some imprudent sentiments uttered; but certainly not much license would or could be ventured on, in an assembly over which Washington presided, and ill-will and resentment could not long be kept up, where there was a Franklin to act as mediator.

If any voucher were wanted for the entire accuracy of Mr. Madison's report, it might be found in the perfect distinctness and individuality, which have been preserved in

the speeches of the different individuals of the convention. Although the substance only of the remarks is generally given, still there is a distinct individuality preserved throughout; Hamilton's prodigious force of intellect and deep-searching insight, yet always prone to dwell upon the lessons of history, without perhaps fully appreciating those peculiar points of American character, and of the circumstances of the times, which qualified, if not destroyed, the force of historical precedent; Madison's proneness to logical analysis, and scientific disquisition; Wilson's generous appeals to first principles; Gouverneur Morris's cold skepticism, ever thinking of the selfish principles of men as the ruling motive of their actions, and ever struggling to solve the insoluble problem, out of a given number of knaves to construct an honest community; and, above all, the practical sagacity and elevated wisdom of Franklin, ever discerning exactly his position and the conditions of surrounding circumstances, and resting all his doctrines upon a just faith in humanity, and a wise appreciation of the good not less than the bad qualities of American character. Washington, having been selected as the presiding officer of the convention, and besides nowise given to speech-making, does not appear as one of the debaters, though it cannot be doubted that his influence on the doings of the convention was very great.

The great principles, on which the new scheme of government was to be based, seem to have caused but little difficulty. The plan of the old confederation was the basis, and mournful experience, that sternest of schoolmasters, had taught all who had ever taken any part in the public business where were its weak points, and what changes must be made in order to give efficiency and respectability to the government. The grand discovery was the principle of executing the national powers by means of national officers, and operating upon individuals instead of states. We have seen Mr. Madison already expressing his opinion in

favor of the right of congress to use coercive measures against the states, under the old confederation; but the difficulties of such a measure were great enough, probably, to prevent congress from attempting to use such a power, even if expressly granted. Of course, congress was becoming a laughing-stock and a by-word among the nations; invested with an authority, indeed, to do great things, but without the least power to exercise its rights. The plan of operating directly upon individuals was the one thing wanting, and completed the grand outline of a constitutional government, by rendering it thoroughly and effectually national. It would perhaps be difficult to say who is to be considered as the author of this grand discovery. It was probably the result of gradual approximations, as have been many other grand discoveries. The germ of it appears in the proposition which had been made by congress to the states, for a permanent revenue to be derived from duties laid on imported commodities, and collected by officers, appointed by, or at least responsible to, congress. The three great fundamental principles of the union — namely, nationality, perpetuity, and individual responsibility — being once firmly established, the rest followed of course. The greatest practical difficulties which remained were taxation and representation; and we can probably in no way better complete our purpose of giving some idea of the debates, and the manner of reporting them, than by adding a few extracts from some of the speeches on these points.

“Mr. Wilson. The subject, it must be owned, is surrounded with doubts and difficulties. But we must surmount them. The British government cannot be our model. We have no materials for a similar one. Our manners, our laws, the abolition of entails of primogeniture, the whole genius of the people, are opposed to it. He did not see the danger of the states being devoured by the national government. On the contrary, he wished to keep them from devouring the national government. He was not, however,

for extinguishing these planets, as was supposed by Mr. Dickinson; neither did he, on the other hand, believe that they would warm or enlighten the sun. Within their proper orbits they must still be suffered to act for subordinate purposes, for which their existence is made essential by the great extent of our country. He could not comprehend in what manner the landed interest would be rendered less predominant in the senate by an election through the medium of the legislatures, than by the people themselves. If the legislatures, as was now complained, sacrificed the commercial to the landed interest, what reason was there to expect such a choice from them as would defeat their own views? He was for an election by the people, in large districts, which would be most likely to obtain men of intelligence and uprightness; subdividing the districts only for the accommodation of voters."

"Mr. Wilson hoped, if the confederacy should be dissolved, that a majority, — nay, a minority, of the states would unite for their safety. He entered elaborately into the defence of a proportional representation, stating for his first position, that, as all authority was derived from the people, equal numbers of people ought to have an equal number of representatives, and different numbers of people, different numbers of representatives. This principle had been improperly violated in the confederation, owing to the urgent circumstances of the time. As to the case of A and B stated by Mr. Patterson, he observed, that, in districts as large as the states, the number of people was the best measure of their comparative wealth. Whether, therefore, wealth or numbers was to form the ratio, it would be the same. Mr. Patterson admitted persons, not property, to be the measure of suffrage. Are not the citizens of Pennsylvania equal to those of New Jersey? Does it require one hundred and fifty of the former to balance fifty of the latter? Representatives of different districts ought clearly to hold the same proportion to each other, as their respective constituents hold to each other. If the small states will not confederate on this plan, Pennsylvania, and he presumed some other states, would not confederate on any other. We have been told that each state being sovereign, all are equal. So each man is naturally a sovereign over himself, and all men are therefore naturally equal. Can he

retain this equality when he becomes a member of civil government? He cannot. As little can a sovereign state, when it becomes a member of a federal government. If New Jersey will not part with her sovereignty, it is in vain to talk of government. A new partition of the states is desirable, but evidently and totally impracticable."

The following remarks, from Dr. Franklin, must have been much to the purpose:

"Mr. Chairman,—It has given me great pleasure to observe, that, till this point, the proportion of representation, came before us, our debates were carried on with great coolness and temper. If any thing of a contrary kind has on this occasion appeared, I hope it will not be repeated; for we are sent here to consult, not to contend, with each other; and declarations of a fixed opinion, and of determined resolution never to change it, neither enlighten nor convince us. Positiveness and warmth on one side naturally beget their like on the other, and tend to create and augment discord and division, in a great concern wherein harmony and union are extremely necessary to give weight to our councils, and render them effectual in promoting and securing the common good.

"I must own, that I was originally of opinion it would be better if every member of congress, or our national council, were to consider himself rather as a representative of the whole, than as an agent for the interests of a particular state; in which case the proportion of members for each state would be of less consequence, and it would not be very material whether they voted by states or individually. But as I find this is not to be expected, I now think the number of representatives should bear some proportion to the number of the represented; and that the decisions should be by the majority of members, not by the majority of the states. This is objected to from an apprehension that the greater states would then swallow up the smaller. I do not at present clearly see what advantage the greater states could propose to themselves by swallowing up the smaller, and therefore do not apprehend they would attempt it."

Mr. Hamilton was for a strong general government, his fears being that the state sovereignties would prove too strong for the national government.

“All the passions, then, we see, of avarice, ambition, interest, which govern most individuals, and all public bodies, fall into the current of the states, and do not flow into the stream of the general government. The former, therefore, will generally be an overmatch for the general government, and render any confederacy in its very nature precarious. Theory is in this case fully confirmed by experience. The Amphictyonic council had, it would seem, ample powers for general purposes. It had, in particular, the power of fining and using force against delinquent members. What was the consequence? Their decrees were mere signals of war. The Phocian war is a striking example of it. Philip at length, taking advantage of their disunion, and insinuating himself into their councils, made himself master of their fortunes. The German confederacy affords another lesson. The authority of Charlemagne seemed to be as great as could be necessary. The great feudal chiefs, however, exercising their local sovereignties, soon felt the spirit, and found the means, of encroachments, which reduced the imperial authority to a nominal sovereignty. The diet has succeeded, which, though aided by a prince at its head, of great authority independently of his imperial attributes, is a striking illustration of the weakness of confederated governments. Other examples instruct us in the same truth. The Swiss cantons have scarce any union at all, and have been more than once at war with one another.”

The following speech of Mr. Madison is a good illustration of his analytical mode of reasoning, the subject of discussion being the term of office of the second branch of the legislature, namely, the senate.

“Mr. Madison. In order to judge of the form to be given to this institution, it will be proper to take a view of the ends to be served by it. These were,—first, to protect the people against their rulers; secondly, to protect the people against the transient impressions into which they themselves might be led.

A people deliberating in a temperate moment, and with the experience of other nations before them, on the plan of government most likely to secure their happiness, would first be aware, that those charged with the public happiness might betray their trust. An obvious precaution against this danger would be, to divide the trust between different bodies of men, who might watch and check each other. In this they would be governed by the same prudence which has prevailed in organizing the subordinate departments of government, where all business liable to abuses is made to pass through separate hands, the one being a check on the other. It would next occur to such a people, that they themselves were liable to temporary errors, through want of information as to their true interest; and that men chosen for a short term, and employed but a short portion of that in public affairs, might err from the same cause. This reflection would naturally suggest, that the government be so constituted as that one of its branches might have an opportunity of acquiring a competent knowledge of the public interests. Another reflection, equally becoming a people on such an occasion, would be, that they themselves, as well as a numerous body of representatives, were liable to err, also, from fickleness and passion. A necessary fence against this danger would be, to select a portion of enlightened citizens, whose limited number, and firmness, might seasonably interpose against impetuous counsels. It ought, finally, to occur to a people deliberating on a government for themselves, that as different interests necessarily result from the liberty meant to be secured, the major interest might, under sudden impulses, be tempted to commit injustice on the minority. In all civilized countries the people fall into different classes, having a real or supposed difference of interests. There will be creditors and debtors; farmers, merchants, and manufacturers. There will be, particularly, the distinction of rich and poor. It was true, as had been observed (by Mr. Pinckney,) we had not among us those hereditary distinctions of rank which were a great source of the contests in the ancient governments, as well as the modern states of Europe; nor those extremes of wealth or poverty, which characterize the latter. We



cannot, however, be regarded even at this time, as one homogeneous mass, in which every thing that affects a part will affect in the same manner the whole. In framing a system which we wish to last for ages, we should not lose sight of the changes which ages will produce. An increase of population will of necessity increase the proportion of those who will labor under all the hardships of life, and secretly sigh for a more equal distribution of its blessings. These may in time outnumber those who are placed above the feelings of indigence. According to the equal laws of suffrage, the power will slide into the hands of the former. No agrarian attempts have yet been made in this country; but symptoms of a levelling spirit, as we have understood, have sufficiently appeared in a certain quarter, to give notice of the future danger. How is this danger to be guarded against, on the republican principles? How is the danger, in all cases of interested coalitions to oppress the minority, to be guarded against? Among other means, by the establishment of a body, in the government, sufficiently respectable for its wisdom and virtue, to aid, on such emergencies, the preponderance of justice, by throwing its weight into that scale. Such being the objects of the second branch in the proposed government, he thought a considerable duration ought to be given to it. He did not conceive that the term of nine years could threaten any real danger; but, in pursuing his particular ideas on the subject, he should require that the long term allowed to the second branch should not commence till such a period of life as would render a perpetual disqualification to be reelected, little inconvenient, either in a public or private view. He observed, that as it was more than probable we were now digesting a plan, which in its operation would decide forever the fate of republican government, we ought not only to provide every guard to liberty that its preservation could require, but be equally careful to supply the defects which our own experience had particularly pointed out."

But our extracts are already going beyond the reasonable limits of an article, and we must close with earnestly recommending the Madison Papers to the careful study of all who are desirous of understanding the civil and political history of the revolution.

E. L. C.

## ART. VII.—AMERICAN CRIMINAL TRIALS.

*American Criminal Trials.* By PELEG W. CHANDLER. Volume I. Boston: Charles C. Little & James Brown. London: A. Maxwell, 32 Bell Yard, Lincoln's Inn. 1841.

THE merry companion of the youthful Harry, whom the genius of Shakspeare has made immortal, congratulated himself that he not only possessed wit himself, but was the cause of wit in others. We think that we may, in like manner, felicitate ourselves, that if we have not written and published a collection of the celebrated trials of this country, we have perhaps been instrumental in causing it to be done by another. Whether the idea of making such a collection was suggested to its accomplished author, by the articles which have appeared in our pages upon this subject, or whether he has received any useful hints therefrom in regard to the manner of executing his task, we have not taken the liberty to inquire, and it is really a matter of no consequence. The honor of filling a vacant department of American literature, of supplying a want which has been felt alike by the profession and by the public, belongs not to the individual who may have suggested the enterprize, but to him who has carried it into execution. It has given us no common pleasure, to find a work of this interest and importance undertaken by a gentleman so favorably known to the public as an editor and reporter, who possesses unusual facilities for prosecuting it with success; and who is admirably qualified for the work by habits of industry and patient research, by the possession of good taste, and by a sound and discriminating judgment.

The present volume, which, we presume, is but the commencement of the series which Mr. Chandler proposes to

publish, contains four hundred and thirty-six pages, and in mechanical execution and appearance corresponds with Sparks's *American Biography*, one of the neatest and most popular works ever issued from the American press. The first twenty or thirty volumes of the *French Causes Célèbres* were of the same size. When Mr. Chandler shall have completed his labors, and have brought down his reports to the present day, we shall be much disappointed if they do not rank with either of the works before mentioned. The selection of cases, thus far, has been extremely judicious, and if the author exercises the same sound discrimination and good taste in collecting the materials for the volumes that are to follow, it must be a work of high value and of permanent popularity. The trial of an interesting cause has even more charms for the common mind than biography. It is a drama of real life, and, when reported with skill and vivacity, addresses itself more directly to the curiosity and sympathies of men than do "the annals of the great." From the days of the revolution down to the present, the American people have evinced a decided partiality for reading of this description, and it was to this that Burke attributed their ardent attachment to liberty.

The author has been obliged, however, to encounter one difficulty in the outset, which will constantly diminish as he advances. He has been compelled to begin at the beginning, — to go back to the earliest period of American history, and report a series of cases, which have lost much of their interest on account of their antiquity. He has been obliged to enter a field which had been previously gleaned by the historian, the essayist, and the lecturer, and to write upon topics which have been made familiar to the public through many channels of information. It is obvious, however, that it was incumbent upon him to enter this uninviting field, if he intended to render his work one of permanent value. When it shall have been completed in the style in which

it has been commenced, it will not be one of its least excellences, that it is a complete record of the most remarkable cases which have been tried in this country, from its settlement down to the present time. The moral courage of an author, who has cast aside the abundant materials, which are lying all around him, for making a collection merely *ad captandum vulgus*, who has resisted the temptation of writing a work that would acquire immediate popularity and would therefore sell, and has gone back to the dusty records of the past in order to render his work complete and deserving of lasting regard, is worthy of all commendation, and promises well for the spirit in which the enterprize will be prosecuted. In this respect, it presents a striking contrast to that wretched *omnium gatherum* of monstrosities, the Philadelphia book, entitled celebrated trials of all countries, of which we have spoken in a former number.

The volume before us contains ten cases. The first is that of Ann Hutchinson, for heresy, before the general court of Massachusetts, in 1637; and a most vivid picture it is of the unhappy religious dissensions of those unhappy times, and a touching memorial, too, of the character of a pious, high spirited, and brave woman.

Thirty pages are then devoted to the trials of the Quakers before the same tribunal, in 1656 and 1661, and seventy-five to the memorable prosecutions for witchcraft in Salem, in 1692.

These are followed by a short account of the trial of Thomas Maule, at Salem, in 1696, for a slanderous publication and blasphemy, and this by the trial of John Peter Zenger, before the supreme court of New York, for two libels on the government, in 1735, in which the right of the jury to find a general verdict was discussed at great length, and also whether the defendant, on an indictment for libel, was entitled to give in evidence to the jury the truth of the

charges contained in the libel. This case was admirably reported at the time, and is deeply interesting as an evidence of the early and zealous attachment of the American people to a free press. The jury returned a verdict of not guilty, which was received with shouts. Mr. Hamilton, the counsel of the accused, whose argument is reported at large, was conducted by the crowd from the hall to a splendid entertainment. The whole city renewed the compliment at his departure the next day, and he entered his barge under a salute of cannon. The common council of New York presented him the freedom of the city; and a splendid gold box, in which to enclose the certificate of the freedom, was also purchased by subscription, on which the arms of the city were engraved, encircled with appropriate mottos. Mr. Chandler has appended to this case an historical sketch of the discussions, which afterwards occurred in various states, of the great question which was agitated in the trial of Zenger, and a statement of the law as it now exists.

Considerable space is then devoted to the trials of certain negroes and others for a conspiracy to burn the city of New York and murder the inhabitants, in 1741, at which period domestic slavery existed in that state.

The two next cases, which are closely connected, are those of Jacob Leisler and Col. Nicholas Bayard for high treason, in New York, the first in 1691, the other in 1702.

The very brief account of the trial of the crew of the Pitt Packet, for murder, is interesting chiefly as an instance of desperate and determined resistance by Yankee sailors to impressment into the British navy.

The last and the longest case in the volume is the trial of the British soldiers, for the murder of several inhabitants of Boston, on the memorable fifth of March, commonly called the Boston Massacre.

The appendix contains a sketch of William Stoughton,

who has acquired a sad celebrity as the presiding justice at the trials of the witches in Salem; a sketch also of the professional life of John Adams, and of Josiah Quincy, Jr.; and several interesting documents drawn from the archives of the court in Salem, by the untiring perseverance of Mr. Chandler, relative to the prosecutions against the Quakers and persons accused of witchcraft.

The work is embellished by a beautifully engraved portrait of chief justice Stoughton.

It may be owing to a professional bias, but we confess that this volume has conveyed to our mind a far more vivid and stronger impression of the spirit and temper of those early times, than any histories which it has been our fortune to peruse. We enter the halls of council and of judgment; the judges and the jurors are before us; the criminals are brought in, and we behold them surrounded by an eager and excited populace; and the whole scene passes before the mind's eye as a living and moving picture. That great and terrible delusion, which makes the early history of New England as dark and awful as the grave, which resulted in the murder of so many poor, miserable, and helpless beings, has been described by eloquent pens; but the impression they have made upon our mind has fallen far short of the dreadful record of the proceedings of the court. At one time, we see a woman confronted with her accusers, amazed at the strength of the evidence against her, deprived almost of the power of speech, and confirming suspicion by her agitation; another, yielding to the terrors of her situation, imploring the protection of her friends; and, another still, submitting to her inevitable fate with heroic resolution. There is nothing in the Grecian drama that surpasses, in touching pathos, some scenes in the trials and prosecutions of these "greatly suffering" victims of a strange superstition.

It is not our purpose, however, to examine any of these cases in detail, or to write commentaries upon the charac-

ter of our ancestors. The perusal of this volume has suggested some views, respecting the conduct and duty, in difficult emergencies, of the members of the profession to which we belong, and for whose use this journal was instituted, which we think important enough to spread before the professional reader.

The history of nearly every free people is a history of excitements, of longer or shorter duration; some more or less general and pervading, of more or less intensity — but always excitements. We need not go back to Grecian and Roman story for confirmation of this remark: our own and our mother country supply us with ample proof and illustration. Who cannot call to mind the popish plot, in which the public mind reached such a height of credulity, that half the kingdom suspected the king himself to be concerned in it, though its professed object was his own murder — the meal-tub plot — the Wilkes election — the Gordon mob — the South Sea bubble — Catholic emancipation — the Queen Caroline investigation — and the thousand lesser and more local excitements and commotions, which have arisen and passed away within the last fifty years. The people of our own country appear to possess a peculiar fondness for agitation. The frequent recurrence of our elections operates to a great extent as a safety-valve, and causes a great deal of superfluous steam to be discharged. But notwithstanding all this, there is enough of restlessness and recklessness, and of a love of excitement, to create a universal agitation, a wide-spread mania, whenever an occasion is furnished to bring it out. After a long period of repose, the public mind seems to arrive at a state of gunpowder combustibility, and when the spark is communicated, the whole mass becomes fired. Was there ever, for instance, a more red-hot excitement than that which raged in this country a few years against masonry? It subsided as suddenly as it rose; and now the most furious and fiery of its leaders

are hand and glove with knights templars and royal arches. No sooner had this tremendous uproar in the moral world subsided, than the people rushed into eastern and western land speculations, and madness ruled the hour. This too passed away; and then arose a political excitement, the like of which this country never saw. Such, too, was the delusion that pervaded Massachusetts, in the year 1692, in regard to witchcraft; and the city of New York, in 1741, respecting the supposed negro plot.

Little danger is ever to be apprehended from political excitements, however fierce. They have a natural period of termination; and, besides, the community is always so nearly equally balanced, that each party operates as a check and restraint upon the other. It is fortunate for our country, that our excitements are generally political, and that they pass off so harmlessly. We do not speak in censure of the several movements we have mentioned, but merely of the fact, that they do exist, that they return frequently, that they often rage with a sort of hurricane violence, and that they arise even from the most frivolous causes. But it is when this morbid love of action, of exhilaration, takes another than a political channel, that it is attended with the most serious dangers; and it is to the conduct of the profession in such emergencies, that we would direct the attention of our readers. In such a state of the public mind, when it is eagerly looking for something upon which to fasten and vent its gathered fury, "nursing its wrath to keep it warm," a crime is committed — the rumor of a plot or conspiracy gets wind — and straightway the whole community becomes little better than an infuriated mob. When Helen Jewett was murdered in New York, a few years since, nothing could exceed the public indignation. She was notoriously a prostitute, and the offence was committed in a brothel. A few months since, a beautiful and virtuous female, of the same city, was enticed from her home, basely



ravished and brutally murdered, and the public press, with all its enginery and influence, has never been able to lash the public into much beyond an idle curiosity. What is the explanation of this phenomenon? It is found in the susceptibility of the public mind, at one time, to excitement, in its insusceptibility, its exhaustion, at another. These excitements may recur, therefore, when the cause is entirely inadequate to produce them; and when they are extensive and intense, and are directed, too, against an individual offender or a particular offence, the consequences may be dreadful.

It is in such exigencies as these, that the bar is the bulwark of safety. The bench, we say it with all respect for those exalted functionaries, has often bent and given way to popular clamor; it has yielded often—it may yield again. The bar, we repeat it, is the bulwark of safety—the last, the only security of the persecuted and forsaken, whose voice is drowned in the angry war of a furious multitude; who has nothing to hope, but from the unblenching courage of his counsel. In times like these, the members of the bar are required to stand between the hot avenger and his victim; and woe be to him, say we, if he falter an instant in his courage or his efforts. The volume before us affords a strong illustration of the course which the advocate should pursue, and also of the tremendous evils resulting from an opposite conduct.

“In the year 1741, the city of New York was thrown into the most intense excitement and alarm, by the rumor of a plot by the negro population to burn the city and massacre the inhabitants. The fear of such an event had some foundation in the fact, that negro slavery, at that day, was attended with difficulties and dangers, which, to a certain extent, have since ceased to exist. Most of the slaves were Africans by birth, who had been violently torn from their native land and reduced to servitude. Their spirits were not yet entirely subdued; and a race, which at this

day is remarkable for implicit obedience and quiet submission, were, at the time alluded to, rude, boisterous, and vicious, and had in their number many restless and daring spirits, whose influence was justly feared by the white population.

“There had been frequent insurrections in different parts of the country. The Spanish government made direct efforts to induce the slaves to revolt. Liberty and protection had been proclaimed to all fugitive negroes from the English by the governor of Florida, and he had actually formed a regiment from the negro refugees, appointing officers from among themselves, allowing them the same pay, and clothing them in the same uniform with the regular troops of Spain. In 1738, a serious revolt took place in South Carolina, and a large number of the insurgents suffered the last infliction of human power and vengeance.

“The negroes in the largest commercial city of America were peculiarly exposed to the temptations of freedom. They became more intelligent than those in the interior, and their passions were inflamed by familiar intercourse with the lower orders of the white population. As early as 1712, there had been an insurrection of the slaves of New York, who fired a house and murdered several citizens before they were dispersed by the soldiers. Recollection of this, and a general distrust of the negro population, rendered the citizens of that city peculiarly suspicious of their movements; and, when in 1741, the cry was raised of a NEGRO PLOT, there ensued a scene of confusion and alarm, of folly, frenzy, and injustice, which scarcely has a parallel in this or any other country.

“In February of that year, the house of a merchant, named Hogg, was robbed, and suspicions were entertained of John Hughson, who kept a low tavern where negroes were in the habit of resorting. This man had an indented servant, Mary Burton by name, about sixteen years of age, who gave information against him, and he confessed that a part of the goods were brought to his house, which he delivered up to the magistrate. Peggy Carey, a woman of infamous character, was also implicated in the robbery and was committed to prison. Soon after these occurrences, the

government house in the fort was discovered to be on fire, at mid-day, and was burnt, together with the king's chapel, the secretary's office, the barracks, and the stable. The fire was satisfactorily enough accounted for, but other fires occurring in quick succession, on different days, and some of them being undoubtedly the work of incendiaries, great alarm was excited.

"It happened that a Spanish vessel, partly manned with negroes, had previously been brought into New York as a prize, and all the men had been condemned as slaves in the court of admiralty, and were sold at vendue; 'now these men had the impudence to say, notwithstanding they were black, that they were freemen in their own country, and to grumble at their hard usage in being sold for slaves.' One of them had been bought by the owner of a house in which fire was discovered, and a cry was raised among the people, 'the Spanish negroes! the Spanish! take up the Spanish negroes!' They were immediately incarcerated, and a fire occurring in the afternoon of the same day, the rumor became general, that the slaves in a body were concerned in these wicked attempts to burn the city.

"The military were turned out, and sentries were posted in every part of the city, while there was a general search of the houses, and an examination of suspicious persons. The lieutenant governor, at the request of the city authorities, offered a reward of one hundred pounds and a full pardon to any free white person who should discover the persons concerned in these incendiary acts, and freedom with a reward of twenty pounds to any slave who should make the same discovery. The offer was tempting, and, at the ensuing session of the superior court, Mary Burton, the servant of Hughson, made a statement before the grand jury, to the effect, that three negroes, Cæsar, Prince, and Cuffee, were accustomed to meet at her master's, and had made a plan to burn the whole city and massacre the inhabitants. She had seen a large number of negroes at the same place, who were all in the conspiracy, and there were in her master's house a quantity of fire arms. The only white persons concerned were her master, his wife, and Peggy Carey. The former was to be king, and

Cæsar was to be governor. At one of the meetings she heard Cuffee say, 'that a great many people had too much, and others too little;' and he intimated that such an unequal state of things should not long continue.

"When this statement was made known to the court, they immediately summoned *all the lawyers* in the city to consult upon the measures most proper to be adopted in this emergency. By a law of the colony, negroes might be tried for any offence in a summary way; 'but, as this was a plot in which white people were confederated with them, and most probably were the first movers and seducers of the slaves, there was reason to apprehend a deeper design than the slaves themselves were capable of; and it was judged most advisable that it should be taken under the care of the supreme court.' Accordingly, application was made to the lieutenant governor for an ordinance to enlarge the term of the supreme court; and the bar unanimously offered their assistance on every trial, in their turn, 'as this was conceived to be a matter that not only affected the city, but the whole province.'

"Meanwhile the examinations and confessions were increasing every day. Peggy Carey, the wretched prostitute, being implicated, was examined by the judges in prison. She was promised pardon and reward if she would confess and expose the rest; but she said, 'that if she should accuse any body of any such thing, she must accuse innocent persons, and wrong her own soul;' and she denied all knowledge of the fires. But upon being convicted as a receiver of stolen goods, she 'seemed to think it high time to do something to recommend herself to mercy,' and made a voluntary confession, in which she changed the scene of the plot from Hughson's to John Romme's, a shoemaker, and the keeper of a low tavern, where she said several negroes used to meet, to whom Romme administered an oath; and they were to attempt to burn the city, but if they did not succeed, they were to steal all they could, and he was to carry them to a strange country and give them their liberty. All the slaves mentioned by her were immediately arrested. Romme absconded, but was afterwards taken in New Jersey.

"On the twenty-ninth of May, 1741, the negro slaves, Quack and Cuffee, were brought to trial before the supreme court, on a charge of a conspiracy to murder the inhabitants of the city of New York. The principal evidence against them came from Mary Burton. There was also some evidence against them from negroes. *The prisoners had no counsel*, while the attorney general, assisted by two members of the bar, appeared against them. The evidence had little consistency, and was extremely loose and general. The arguments of the lawyers were chiefly declamatory respecting the horrible plot, of the existence of which, however, no sufficient evidence was introduced."

The prisoners were convicted and ordered to execution. When they were chained to the stake, being much terrified and persuaded to confess, they admitted all that was required; whereupon an attempt was made to procure a reprieve; but a great multitude had assembled to witness the executions, and the excitement was so great, that it was considered impossible to return the prisoners to prison. They were accordingly burned at the stake. Soon after three other persons were brought to trial. "The prisoners had no counsel and almost every member of the bar appeared against them." The excitement continued to increase from day to day, convictions and executions followed each other in quick succession; every new accusation produced a harvest of new confessions, implicating others, "until at length the prison became so full that there was danger of disease, and the court again called in the assistance of the members of the bar, *who agreed to bear their respective shares in the fatigue of the several prosecutions.*" The terrible cry of popery was now raised, and led to the sacrifice of an amiable and accomplished clergyman, John Ury, whose trial is reported in full. "He had no counsel, while there were arrayed against him the attorney general and four eminent lawyers of the New York bar." Mr. Chandler states that the whole number of persons taken into custody

on suspicion of being engaged in the conspiracy was over one hundred and fifty, of whom four white persons were hanged, eleven negroes were burnt, eighteen were hanged, and fifty were transported and sold ; and, upon a review of the whole evidence, he pronounces " the whole thing to have been a complete delusion."

Now we venture to say—expecting the concurrence of every professional reader in that opinion—that if a single member of the New York bar had known and performed his professional duty, the delusion would have been dispersed as easily as the mist by the rays of the sun. A single bold advocate, opposing himself to an excited populace ; opposing himself to the court too, if need be ; subjecting the witnesses to rigid cross-examination ; examining them apart from each other ; pointing out their gross inconsistencies ; disclosing the weakness of the evidence ; his courage mounting with the occasion—would have arrested the progress of this delusion at once. At any rate, we are confident that all our readers will agree, that it never could have reached the height of frenzy which it at last attained. Such was the conduct of the New York bar. If, instead of confederating to assist in the prosecutions, they had combined to aid the accused, they would have evinced a better knowledge of their professional obligations.

But the volume before us enables us to present a striking and noble contrast to this infamous confederacy and gross delinquency, under circumstances far more difficult, by the members of another bar.

On the evening of the fifth of March, 1770, the town of Boston was thrown into a state of dreadful agitation by the murder of five citizens in the streets, by a party of British soldiers.

" As might be expected, this tragedy ' wrought the whole people of Massachusetts, and above all, the inhabitants of Boston, to

the highest pitch of rage and indignation. The populace breathed only vengeance. Even minds better instructed, and of higher principles than the multitude, in the excitement of the moment, could not endure the doctrine, that it was possible for an armed soldiery to fire upon and kill unarmed citizens, and commit a crime less than murder. Political animosity, and the natural antipathy to troops stationed in the metropolis, sharpened this vindictive spirit. The friends of the government were either silent, or only expressed regret and lamentation at the event. The friends of freedom were loud in their indignation, and clamorous for that justice which declares that blood shall be the penalty of blood. . . . Under such circumstances, the British soldiers were to be tried for their lives, and serious fears were entertained, not only by their friends but by the candid and moderate of all parties, that they would not be dealt with by even-handed justice.

“But among the friends of freedom there were men who viewed this matter in the calm and rational light of truth and justice. Anxious for the honor of the town, doubly anxious for the cause of humanity, they felt an earnest desire that justice should not fall a sacrifice in her own temple. Of these John Adams and Josiah Quincy, junior, deserve most honorable mention. Sympathizing most deeply with the mass of their fellow citizens in their hatred of the instruments of their oppressors, and in their detestation of the principles they had been sent hither to maintain, no men had more openly or pathetically appealed to their fellow citizens, or had more studiously excited their resentment, both in the gazettes and in Faneuil hall, against the troops and their employers. What, then, must have been their surprise, when captain Preston solicited their professional services in his own behalf, and in that of the soldiers! To understand the difficulty of their situation, it is necessary to realize the exasperated state of public feeling. The spirit of revenge glowed with a fervor almost universal. On the one hand, were the obligations of humanity, official duty, and the strong desire that justice should be done; on the other, the confidence of their political friends, popularity, and that general affection which their public course had attained for them, in so re-

markable a degree, among their fellow citizens, were to be hazarded. After deliberation and consultation with each other and their friends, both of these patriots yielded all personal considerations to the higher obligations of humanity and official duty. They braved the fury of the moment, and interposed their learning, talents, and well-earned influence, to that torrent of passions, which, for a time, threatened to bear down the landmarks of justice."

But these were not all the difficulties that the advocates had to encounter. The father of Quincy, as soon as he heard the rumor that he had engaged to act as counsel for the prisoners, addressed a letter to him, which contains the following sentences : — " My dear son, I am under great affliction at hearing the bitterest reproaches uttered against you, for having become an advocate for those criminals, who are charged with the murder of their fellow-citizens. Good God ! Is it possible ? I will not believe it. . . . I must own to you, it has filled the bosom of your aged and infirm parent with anxiety and distress, lest it should not only prove true, but destructive of your reputation and interests ; and I repeat, I will not believe it, unless it be confirmed by your own mouth, or under your own hand. Your anxious and distressed parent." What could be more painful to an honorable mind than to be suspected of betraying his principles for hire. How acted the young advocate — the popular leader — the rising statesman ? There is nothing in the annals of the bar, or in the records of human courage, loftier in sentiment, or more correct in principle, than his reply. If Josiah Quincy had left us nothing but this letter, he would have discharged the duty which every man owes to his profession. And when it is read, and his heroic, high-principled sense of duty is contrasted with the conduct of the New York bar, we have only to say, in the language and with the emotions of Hamlet : " Look on that



picture and on this—the counterfeit presentiment of two brothers.”

“ To Josiah Quincy, Esq., Braintree.

“ Boston, March 26, 1770.

“ Honored Sir — I have little leisure, and less inclination, either to know, or to take notice of, those ignorant slanderers, who have dared to utter their ‘ bitter reproaches ’ in your hearing against me, for having become an advocate for criminals charged with murder. But the sting of reproach, when envenomed only by envy and falsehood, will never prove mortal. Before pouring their reproaches into the ear of the aged and infirm, if they had been friends, they would have surely spared a little reflection on the *nature of an attorney’s oath and duty*, some trifling scrutiny into the business and discharge of his office, and some small portion of patience in viewing my past and future conduct.

“ Let such be told, si r, that these criminals, charged with murder, are *not yet legally proved guilty*, and, therefore, however criminal, are entitled, by the laws of God and man, to all legal counsel and aid ; that my duty as a man obliged me to undertake ; that my duty as a lawyer strengthened the obligation ; that from abundant caution, I at first declined being engaged ; that after the best advice and most mature deliberation had determined my judgment, I waited on captain Preston, and told him that I would afford him my assistance ; but, prior to this, in presence of two of his friends, I made the most explicit declaration to him, of my real opinion on the contests (as I expressed it to him) of the times, and that my heart and hand were indissolubly attached to the cause of my country ; and, finally, that I refused all engagement, until advised and urged to undertake it, by an Adams, a Hancock, a Molineux, a Cushing, a Henshaw, a Pemberton, a Warren, a Cooper, and a Phillips. This and much more might be told with great truth, and I dare affirm that you, and this whole people, will one day REJOICE, that I became an advocate for the aforesaid ‘ criminals,’ charged with the murder of our fellow citizens.

“ I never harbored the expectation, nor any great desire, that all men should speak well of me. To inquire my duty, and to do

it, is my aim. Being mortal, I am subject to error ; and conscious of this, I wish to be diffident. Being a rational creature, I judge for myself, according to the light afforded me. When a plan of conduct is formed with an honest deliberation, neither murmuring, slander, nor reproaches move. For my single self, I consider, judge, and with reason hope to be immutable.

“ There are honest men in all sects — I wish their approbation ; there are wicked bigots in all parties — I abhor them.

“ I am, truly and affectionately, your son,

“ JOSIAH QUINCY, JUN.”

It is a sublime spectacle to see the soldier, in front of a trembling, panic-stricken army, breasting the shock of battle, and by his single arm and heroic spirit rekindling their drooping courage, and turning the tide of battle. It is not less sublime to see the advocate, in the midst of a raging populace thirsting for a victim, calmly, fearlessly, opposing himself alone to the mighty mass, sometimes at the peril of his life, always at the peril of his darling reputation ; and, at last, changing the whole current of popular feeling by his single voice, and thus rescuing some from death, and all from crime.

We beg leave, in conclusion, earnestly to commend this volume to the favorable regard of the profession. It is but the commencement of a work, which is destined, we believe, to take a high place in public esteem ; and the smile of encouragement will cheer the talented and industrious author in the laborious and interesting enterprise upon which he has embarked.

H. G. O. C.

## JURISPRUDENCE.

## I.—DIGEST OF ENGLISH CASES.

## COMMON LAW.

Selections from 11 Adolphus & Ellis, part 2; 6 Bingham's New Cases, part 3; 1 Manning & Granger, part 4; 8 Scott, part 3; 1 Scott's N. R. part 4; 2 Same, part 1; 7 Meeson & Welsby, part 2; 9 Carr. & Payne, part 4.

**ARBITRATION.** (*Conclusiveness of arbitrator's decision.*) In trespass, the defendant pleaded not guilty, and a justification. The cause was referred by order of nisi prius, and the arbitrator awarded, that "as the defendant had not proved his plea, the verdict for the plaintiff ought to stand:" and then stated several reasons for his opinion, which were not satisfactory: held, that the adjudication was sufficient, and that the sufficiency of the reasons assigned by the arbitrator could not be taken into consideration. *Archer v. Owen*, 9 D. P. C. 341.

**BILLS AND NOTES.** (*Excuse for want of notice of dishonor.*)

A declaration on a banker's check, which had been refused payment, by way of excuse for the want of notice to the drawers, alleged that the drawees had not, at the time the check was drawn, and from thence to the time of its presentment, any effects of the drawer in their hands, nor had the drawer sustained any damage by reason of his not having had notice of the non-payment. Held good on general demurrer. (1 T. R. 405; 2 T. R. 317; 3 Campb. 334; 7 East, 359.) *Kemble v. Mills*, 2 Scott's N. R. 121; 9 D. P. C. 446.

**COMPUTATION OF TIME.** Under the 3 Geo. IV. c. 39, s. 1, which requires that every warrant of attorney to confess judg-

ment shall be filed within twenty-one days after its execution, a warrant executed on the 9th day of the month may be filed on the 30th. (5 T. R. 383.) *Williams v. Burgess*, 9 D. P. C. 544.

**DEVISE.** (*Description of lands devised.*) A testatrix, who had a mansion and lands, situate in three adjoining parishes, K., B., and P., and a meadow in B., devised all her messuage and lands, "situate at K. aforesaid:" held, that the land in B. and P. did not pass under these words, nor under a bequest of "all the residue of her estate and effects whatsoever and where-soever." *Pogson v. Thomas*, 6 Bing. N. C. 337.

2. (*Estate tail, what passes.*) A testator, by his will, devised as follows: "I give my house, gardens, &c. at G. to Mrs. S. S. and all her heirs, if she has any child; if not, then after the decease of herself and her husband Mr. R. S., I give it to F. M. and her heirs." S. S. had a child who was living at the date of the will, but who died four days after the date of it, in the lifetime of the testator: held, that S. S. took an estate tail; and that upon her death without heirs of her body, the property passed to F. M. *Doe d. Jearrad v. Bannister*, 7 M. & W. 292.

**EVIDENCE.** (*Admissibility of parol evidence to control deed.*)

Where land in the possession of a tenant for years is conveyed by deed, the right of the purchaser, as assignee of the reversion, to receive the whole rent for the current quarter, cannot be controlled by a contemporaneous parol agreement to apportion the quarter's rent between the assignor and assignee. *Flinn v. Calow*, 1 M. & G. 589.

2. (*Production of written contract.*) Where a plaintiff closes his case without its appearing that there is a contract in writing relating to the subject-matter of the action, the defendant, if he means to rely upon it, must produce it in a shape to be admissible in evidence, even though the plaintiff had notice to produce it. (8 Taunt. 327.) *Magnay v. Knight*, 2 Scott's N. R. 64.

**INSURANCE.** (*Insurable interest — Bounty.*) A French law provides that "the vessel which shall have fished, either in the

Pacific by doubling Cape Horn, or by passing through the straits of Magellan, or to the south of Cape Horn, at sixty-two degrees of latitude at the least, shall obtain on its return a supplemental bounty, if it brings back in the produce of its fishery one half at least of its burthen, or if it can prove a navigation of sixteen months at the least : ” held, first, that a vessel which had caught fish to the amount of half its burthen in the Atlantic, then doubled Cape Horn and fished without success, and was lost within sixteen months after setting sail, had not complied with the conditions of the law, so as to be entitled to the bounty : and secondly, that the practice of the French government to allow the bounty under such circumstances was a mere matter of expectation, and did not constitute a vested interest which could be the subject of insurance. (2 N. R. 321 ; 11 East, 434.) *Devaux v. Steele*, 6 Bing. N. C. 358.

**LANDLORD AND TENANT.** (*Right of tenant to remove trade erections.*) The plaintiff demised to the defendant certain salt springs ; the defendant was to erect salt works on the premises, and to pay a rent in proportion to the number of works erected, and he covenanted to leave the works in good repair at the end of the term. Held, that iron salt-pans, resting by their weight on a frame of brick, used in the boiling of salt, were parcel of such works, and that the defendant was not entitled to remove them at the end of the term. *Earl of Mansfield v. Blackburne*, 6 Bing. N. C. 426.

**LARCENY.** (*What sufficient taking.*) A was treating B at a public house, and put down a sovereign, desiring the landlady to give him change : she could not do so, and B said he would go out and get change. A said, “ You will not come back with the change.” B replied, “ Never fear.” A allowed B to take up the sovereign, and B never returned either with it or the change : held, no larceny, as A, having permitted the sovereign to be taken away for the purpose of being changed, could never have expected to receive back the specific coin, and had therefore divested himself of the entire possession of it. *Reg. v. Thomas*, 9 C. & P. 741.

2. (*Animus furandi.*) A landlord went to his tenant, who had removed all his goods, to demand rent amounting to 12*l.* 10*s.* taking with him a receipt ready written and signed. The tenant paid to him 2*l.*, and asked to look at the receipt, which was given to him; he refused to return it, or to pay the remainder of the rent. The landlord swore that he never intended finally to part with the receipt unless on payment of all the rent: held, a larceny, if the jury were of opinion that the tenant intended by fraud to obtain possession of the receipt; and that the fact of the part payment of the rent made no difference. *Reg. v. Rodway*, 9 C. & P. 784.

**LIBEL.** (*Evidence of subsequent publication of the same libel.*)

In an action for a libel published in a newspaper, the plaintiff was allowed to give in evidence a repetition of the libellous matter in a paper published after the commencement of the action, for the purpose of showing the *animus*: and in leaving the case to the jury, the judge told them to look at the two paragraphs, and to give the plaintiff such damages as they should think him entitled to under the circumstances: held, that the direction was right. *Barwell v. Adkins*, 2 Scott's N. R. 11.

**LIEN.** (*By bankers.*) B. bought, on account of the plaintiff, and with his money, certain exchequer bills, which he deposited in a box that he kept at his banker's, himself retaining the key. Whenever it became necessary to receive the interest on the bills, and to renew them, B. was in the habit of taking them out of the box, and giving them to the bankers for that purpose, and the new bills were afterwards handed over to B. and locked up by him in the box, the interest received being passed to the credit of his account. The bills themselves were never entered to his account. Held, that the bankers had not, as against the plaintiff, a lien on the bills for advances made by them to B. while the bills remained in their hands in the manner before mentioned. *Brandao v. Barnett*, 2 Scott's N. R. 96.

**MASTER AND SERVANT.** A van was standing at A's door, from which his goods were being unloaded, and his gig was standing behind. B's carriage came up, and there not being

room to pass, B's coachman got down, and laid hold of the van-horse's head; this caused the van to move, and thereby a packing case fell out of the van on the shafts of the gig, and broke them: held, that B was not liable for this injury, as the coachman was not acting in his employ at the time. *Lamb v. Palk*, 9 C. & P. 629.

**PROCHEIN AMY.** The wife of a minor, who was in India, having committed adultery, his father procured himself to be appointed his *prochein amy*, and commenced an action for crim. con. without the son's knowledge or authority: held, that he was entitled to do so, and that the judgment in that action would be a bar to any proceedings for the same cause of action by the son when of age. For a *prochein amy* is a guardian appointed by the court, who may sue without any authority from the infant. (1 Eq. Ca. Abr. 72; F. N. B. 26; Cro. Jac. 640.) *Morgan v. Thorne*, 9 D. P. C. 226.

**SCOTCH MARRIAGE.** A person born in Scotland, of parents domiciled there, but not married until after his birth, although legitimate by the law of Scotland, cannot take real estate in England as heir. *Doe d. Birtwhistle v. Vardill*, (in the house of lords), 6 Bing. N. C. 385; 1 Scott, N. R. 828.

**SHERIFF.** (*Poundage*.) A sheriff is entitled to poundage only upon the real debt *bonâ fide* due from the defendant. Therefore where the sheriff took a debtor in execution under a ca. sa. indorsed by mistake for a larger sum than that really due, which mistake was afterwards amended by a judge's order: held, that the sheriff's claim to poundage must be regulated accordingly. *Evans v. Maners*, 9 D. P. C. 256.

**SHIPPING.** (*Authority of master to sell ship—Ratification of sale by owner—Registry Act*.) Semble, that the master of a ship has authority, when, in consequence of injury to the ship during the voyage, there is no prospect of bringing her to the termination of the voyage, to sell her for the benefit of all parties interested. (10 East, 143; 5 Esp. 65; 2 B. & C. 691; 1 Bing. 445.)

At all events where the proceeds of such sale have been re-

ceived by the owner, that is a sufficient ratification by him of the act of the master in selling her, so as to prevent him from afterwards recovering back the ship from the purchaser or one claiming under him.

So, it is equally a ratification of a sale by an auctioneer, acting under a parol authority from the master.

And where, under such circumstances, the ship was transferred by an instrument executed by the auctioneer, under seal, but in other respects complying with the requisitions of the registry act, 3 & 4 Will. 4, c. 55, s. 31, it was held, that the ratification of the owner was sufficient to give validity to the transfer; for that, as the statute does not require a transfer under seal, the instrument might have the effect of a written transfer by the master according to the statute, as well as that of the deed of the auctioneer.

The purchaser of a vessel under such circumstances cannot set up any defence of lien against an action of trover by the owner. *Hunter v. Parker*, 7 M. & W. 322.

**WITNESS.** (*Competency of annuitant under will.*) In an action of debt against a devisee on a bond of his testator, in which the question is whether the signature of the testator is a forgery or not, a party entitled, under the testator's will, to an annuity charged on his real estate, is not a competent witness for the defendant. (5 B. & Adol. 368.) *Bloor v. Davies*, 7 M. & W. 235.

2. (*Competency of co-contractor.*) In an action for wages, brought by the secretary of an intended joint stock company against one of the provisional committee, another member of the committee is a competent witness for the defendant, after a release from him. (4 B. & Adol. 760; 2 M. & W. 199.) *Beckett v. Wood*, 6 Bing. N. C. 380.

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EQUITY.

Selections from 10 Simons, part 2, and 4 Younge & Collyer, part 1.

**ACCOUNT.** (*Particular and general.*) Where an inquiry was directed as to a particular account, and the defendant in his



answer and his examination set up a general account, but could not prove before the master such items as were to his credit : held, that the master was justified in taking out of the general account, and transferring to the particular, an item of charge admitted by the defendant on the face of his general account. *Cropper v. Knapman*, Y. & C. 249.

2. (*Tenants in common—Mortgage.*) Held, on demurrer, that the mortgagee of a share of one tenant in common of a mine might file a bill for an account against the mortgagor and his co-tenants in common. *Bentley v. Bates*, Y. & C. 182.

**APPORTIONMENT.** (*Dividends of stock.*) A tenant for life of stock comprised in a settlement (made previous to the 4 & 5 Will. IV. c. 22,) died on the day on which the half-year's dividends became due : held, that they belonged to his estate. *Paton v. Sheppard*, S. 186.

**CONVERSION.** (*Contract for sale.*) By a contract for sale of land, by which a day was fixed for the completion of the purchase, it was stipulated that up to that day the rent and other profits should belong to the vendor, his heirs, executors, and administrators ; held, that the intermediate rent belonged to the heir. *Shadforth v. Temple*, S. 184.

- **DISCOVERY.** (*Forfeiture—Money lent at play.*) The liability to forfeiture of securities for money lent at play, under the stat. 9 Ann. c. 14, is not a ground for exempting a party from discovering at the suit of the debtor, against whom he has brought his action, whether the money was lent at play. *Sloman v. Kelly*, Y. & C. 169.

- **DONATIO MORTIS CAUSA.** (*Reserved right of revoking.*) A, being in a declining state of health, delivered to B a locked cash-box, telling her at his death to go to his son for the key ; and saying that it contained money, and was for herself and sister, but adding, that he should want it from her every three months while he lived. A lived some months after this, during which time he twice sent for the box (which was delivered up by B.), for the purpose it seemed of renewing the checks it contained. Shortly after the second return of the box he died ;

and the box being broken open, upon the refusal of the son to deliver up the key, was found to contain two checks given to A by a debtor of his, and one of them directed under cover to B., the other in like manner to her sister. The key was found to have a label with the name of B. on it. Held, that this was not a sufficient *donatio mortis causa*, by reason of the implied right of resumption. *Reddel v. Dobree*, S. 244.

**HUSBAND AND WIFE.** (*Lunatic — allowance to husband.*) A wife who was of unsound mind, being entitled to 500*l.* out of property in the cause, besides an annuity of 100*l.* to her separate use, the court refused to allow the husband more than the 500*l.* for the expense of maintaining her, though the husband showed by affidavits that that sum was insufficient to meet the expenses; but he did not state positively his own inability from other sources. *Nettleship v. Nettleship*, S. 236.

2. (*Separate property — Wife's savings.*) A husband is entitled in his marital rights, and without taking out administration, to moneys saved by the wife out of her separate property, and left by her undisposed of. *Molony v. Kennedy*, S. 254.

**MISTAKE.** (*Law or fact.*) Mistake of rights under a deed may be treated as a mistake of fact, when it consists not in misconstruction, but in overlooking a plain clause; such as that the estate was limited for ninety years, "if A. should so long live," the latter words having been overlooked. *Denys v. Schukburgh*, Y. & C. 42.

**PARTIES.** (*Annuity.*) It is settled practice that a bill cannot be brought for the arrears of an annuity without making the grantor a party, although out of the jurisdiction. *Smythe v. Chambers*, Y. & C. 40.

2. (*Assignee.*) Where a legacy has been assigned prior to the institution of a suit brought by the legatee to recover it, the assignee is a necessary party to such suit. *Campbell v. Dickens*, Y. & C. 17.

3. (*Composition deed.*) The debtor is a necessary party to a deed filed by a creditor against the trustees of a deed for the benefit of creditors, seeking to carry out the deed, unless it is very

clear that there will be no surplus, and such fact must appear distinctly on the bill. *Bedford v. Gates*, Y. & C. 21.

**PLEADING.** (*Answer — Insufficiency.*) A material statement must be answered, though not interrogated to; and the exception referring to it, as being in the form of a question, was held sufficient, as it plainly pointed out the passage. *Woodroffe v. Daniel*, S. 243.

**PRODUCTION OF DOCUMENTS.** (*Pleading — Belief.*) Where the defendant denied positively the plaintiff's title, but said only he believed certain documents which he admitted to be in his possession would not show the truth of the matter stated in the bill, and he believed it would not appear by them that a certain person had committed an act of bankruptcy upon which the title of the plaintiff depended: held, that the defendant was bound to produce the documents, the denial of their relevancy and utility to the plaintiff not being positive. *Bannatyne v. Leader*, S. 239.

**SEPARATION DEED.** (*Consideration.*) In a deed of separation purporting to be made on account of unhappy differences of temper, the husband covenanted with trustees of the wife to pay an annuity to her, but there was no covenant of indemnity to him against the wife's debts. Held, nevertheless, that the covenant, though not good as against the creditors of the husband, was good against his estate. *Clough v. Lambert*, S. 174.

**STATUTE OF LIMITATIONS.** (*Implied promise.*) A deed reciting that A was indebted to B in various sums of an unascertained amount, and was willing to pay the amount which might appear to be due, to be ascertained and paid as therein-after mentioned, and the deed then providing for taking the accounts by the arbitration of two persons named in the deed: held, to take the debt out of the statute, the amount being ascertained by extrinsic parol evidence. *Cheslyn v. Dalby*, Y. & C. 238.

**WILL.** (*After-purchased land — Codicil.*) Testator by his will gave all his lands in H. and F. to his son A., with limitations over. He afterwards purchased other lands in F., and made a codicil, which he described as "a codicil to be taken as part of

his will," and by which he gave his son A., "when in possession of the estates given to him by his will," a power to charge the same : held, that the after-purchased land passed. *Yarnold v. Wallis*, Y. & C. 60.

2. (*Description — Furniture.*) Held, that fixtures, such as stoves, passed by the description of household furniture. *Paton v. Sheppard*, S. 186.
3. (*Discretion — Absolute interest.*) Testator gave 5000*l.* stock to a female infant, to be paid or transferred to, or settled on her, by his executors, by such deed or instrument in writing, as they should think most prudent and proper, on her attaining twenty-one. The infant married in testator's lifetime, and afterwards attained twenty-one. The court ordered the stock to be transferred to her on her sole receipt. *Laing v. Laing*, S. 315.
4. (*Gift for maintenance.*) A direction by testator to apply the interest of a fund for the maintenance and education of his infant nephew, without any disposition of the principal, held to give a life interest to the nephew. *Soames v. Martin*, S. 287.
5. (*Trust — Recommendation — Maintenance.*) Testator, after making a certain provision for A., the son of a relation, till he attained the age of sixteen, added, "I then leave him to the care of my trustees to provide for him in some business or profession, and his future maintenance, out of my funded property:" held, that these words created a trust for placing out A. in business, and also that he was entitled for life to a certain annual sum, the amount of which, as well as of the sum for placing him out, was referred to the master. *Kilvington v. Gray*, S. 293.
6. (*Vesting — Period of division.*) Testator gave residue of his personalty to his wife for life, and then, after giving certain legacies, to be divided among five persons named and their children, the five to take two shares, and the children one share each : held, that this was a gift to the five and to all their children *per capita*, coming in *esse* before the death of wife, and not liable to be divested by death before that time. *Cooke v. Bowen*, Y. & C. 244.

## ECCLESIASTICAL.

Selections from 2 Curteis, part 1.

**ADULTERY.** (*Condonation — Previous adultery.*) Adultery in the husband, which has been condoned, is no bar to his obtaining a decree for separation, and the effect of condonation is not avoided by the fact of the husband having committed a previous adultery with another person, of which the wife at the time of the condonation knew nothing. *Anichini v. Anichini*, 210. (Consist.)

2. (*Evidence — Letters.*) Letters containing high-flown expressions of attachment, coupled with the equivocal conduct in the parties, and with concealment of visits from the husband: held sufficient proof of adultery. *Grant v. Grant*, 16. (Archs.)

**DIVORCE.** (*Cruelty — Children.*) On a suit for divorce by reason of cruelty, the court has no discretion to exclude the testimony of the children, if produced by either party. The objection relied on in this case was their tender age, and the length of time since the facts which they had witnessed. *Lockwood v. Lockwood*, 281. (Consist.)

**EVIDENCE.** (*De bene esse.*) Where evidence had been taken *de bene esse*, by reason of the ill health of witness, the court would not receive it at the hearing without an affidavit that the witness was still incapable of being examined. *Weguelin v. Weguelin*, 263. (Consist.)

**FOREIGNER.** (*Intestacy — Right to administration.*) The principle of law, that the goods of a foreigner dying in this country, without having acquired a domicile here, are distributable according to the law of the country of his domicile, applies only to the distribution of his estate, and not to the administration or possession of it until the right claimants come forward. Accordingly in such a case, administration of the effects of a citizen of the United States, limited for the purpose of paying his debts, and transmitting the balance to the treasury of the United States, was refused to the American consul. *Aspinwall v. The Queen's Proctor*, 241. (Prerog.)

**WILL. (*Erasure.*)** Certain parts of a will being obliterated so as to be illegible, probate granted, leaving them out. *In the goods of Ibbetson*, 337. (Prerog.)

2. (*Same — Alteration.*) Testator having, after due execution, substituted the word "thirty" for "fifty" in a legacy of fifty pounds, the alteration being unattested; probate was granted, leaving out the legacy. *In the goods of Ripplin*, 337. (Prerog.)

3. (*Same — Restoration.*) In a will made before the first of January, 1838, testator after that day erased certain words and inserted others, and wrote on the will an unattested memorandum, stating what the words erased were; motion for probate of the will as it originally stood refused. *In the goods of Brooke*, 343. (Prerog.)

4. (*Power — Publication.*) A power to dispose of personalty by will, "to be signed and published by donee in the presence of and to be attested by two or more credible witnesses," is not duly exercised by an instrument signed and sealed in the presence of two witnesses, the attestation clause being "witnesses to the execution hereof," and parol evidence of publication not being admissible. *Spilsbury v. Burdett* referred to. Since reversed in Exchequer Chamber, 9 Ad. & Ell. 936. *George v. Rielly*, 1. (Prerog.)

5. (*Preparation — Interested parties.*) Although it is not the rule of the ecclesiastical court, and, as sir H. Jenner says, it never was the rule, that they will not admit to probate a will prepared by a party taking an interest under it, unless it be shown either to have been drawn up from instructions or read over to the testator, yet proof of bare execution is not sufficient in such a case; and some proof will be required, varying according to the capacity of the testator and his habits of life, that he knew the effect of the instrument, and the extent of the property which passed by it. *Durling v. Loveland*, 225. (Prerog.)

6. (*Signature.*) The following, being the concluding words of a will, "signed and sealed as and for the will of me, C. E. T. in the presence of us," held to be a sufficient signature, the will

being on the same day acknowledged as a will to the attesting witnesses. *In the goods of Woodington*, 324. (Prerog.)

7. (*Signature by another.*) Testator being too ill to sign, requested another person, who had drawn the will, to sign it for him. This he ~~did~~ in his own name, as on behalf and by direction of testator. Held good. *In the goods of Clark*, 329. (Prerog.)
8. (*Signature by mark.*) Will signed by a mark, and not containing in it the name of the testatrix, held good, being identified *aliunde* as the will. *In the goods of Bryce*, 324. (Prerog.)

## II.—DIGEST OF AMERICAN CASES.

Selections from 4 & 5 Shepley's (16 & 17 Maine) Reports; 2 Ashmead's, 6 Wharton's, and 9 Watts's (Pennsylvania) Reports.

**ACTION.** (*Premature.*) Where by the terms of a contract one party was to perform certain labor and the other, in consideration thereof, was to pay a sum of money in a certain month, an action commenced on the last day of that month is prematurely brought and cannot be maintained, although a demand of the money had been made by the plaintiff on the same day before suing out the writ. *Harris v. Blen*, 4 Shepley, 175.

**ACTION OF ASSUMPSIT.** (*Against obligor in a bond.*)

Where the obligor in a bond, conditioned to convey an undivided moiety of a mill on the payment of certain sums of money, has disabled himself from performing on his part by conveying the land to another, although the obligee may be excused from tendering performance on his part, he cannot maintain an action of assumpsit to recover back the money paid. *Goddard v. Mitchell*, 5 Shepley, 366.

**ADMINISTRATOR.** (*Duty of, in selling property.*) Where an intestate left a bird (an ostrich), which subsequently died in the hands of the administrator, who suffered four months to elapse between the time of taking the inventory and the death of the bird, without exposing it to public sale; which four months

were the most inauspicious for its sale or exhibition ; and it appeared, that an immediate sale of it would have sacrificed the property ; and the postponement was made apparently for the benefit of the estate, the court refused to charge the administrator with the appraised value of the bird. *Secondo Bosio's estate*, 2 Ashmead, 438.

**AGENT.** (*Omission to inform principal.*) The general rule is that for an agent's omission to keep the principal regularly informed of the agent's transactions, and the state of the interests intrusted to him, the measure of damages is to be proportioned to the actual loss sustained by the principal. *Arrot v. Brown*, 6 Wharton, 9.

2. (*Same.*) An exception to this rule is, where the information transmitted is such as may induce the principal, in the adaptation of his operations to his means, to rely on an outstanding debt as a fund on which he may confidently draw ; in which case the agent makes the debt his own. *Ib.*

**ANNUITY.** (*Descent to annuitant of land charged.*) Land charged with the payment of an annuity, having descended to the heirs at law, of whom the annuitant was one, is not thereby wholly discharged from the payment of the annuity, but only *pro tanto*, which the annuitant took as heir at law. *Quære*, if the annuitant had acquired the same interest by purchase, and not by the act of the law ? *Addams v. Heffernan*, 9 Watts, 529.

**ARBITRATION.** (*Mistake in calculating.*) After an award is made, and filed in court by the arbitrators, it is not competent for the court to alter it upon the affidavits of the arbitrators, that they made a mistake in calculating the amount. *Tilghman v. Fisher*, 9 Watts, 441.

**ARREST.** (*Effect of discharge from.*) The arrest of a debtor upon a *capias ad satisfaciendum* and a discharge from the arrest by the consent of the creditor extinguishes the judgment ; and it does not even remain as a good consideration for a subsequent promise to pay ; but if the debtor be discharged in consideration of a promise to pay, such promise is binding on him, and may be enforced by action. *Snevely v. Reed*, 9 Watts, 396.



**ASSIGNEE. (Foreign.)** A foreign assignee in bankruptcy may sue in the courts of Pennsylvania, in the name of the bankrupt, for the assets of the estate, and recover them, unless as against the rights of an American creditor. *Merrick's estate*, 2 Ashmead, 485.

**ASSIGNMENT. (What.)** An order drawn by a creditor upon his debtor in favor of a third person, and accepted, may operate as a valid assignment of the debt, although it be not negotiable, or expressed to be for value received. *Johnson v. Thayer*, 5 Shepley, 401.

2. (*Same.*) Where the plaintiff had agreed with his debtor to take a note payable in three months to himself or to T, and afterwards gave an order on the debtor to "let A. (the defendant) have the note as we agreed for the balance due me;" this does not as between them furnish presumptive evidence of an assignment of the demand to the defendant for value. *McNear v. Atwood*. 5 Shepley, 434.

3. (*Conditional signature.*) An assignment for the benefit of creditors stipulated for a "full and complete release of their respective claims" against the assignors within a certain time. A mercantile firm, creditors of the assignors, executed a general release under seal, and added to the signature the following words, "on condition that the assignment pays over 25-100 on our claim:" *Held*, that the condition was void, and the release single and absolute; and that it extinguished the debt. *Tyson v. Dorr*, 6 Wharton, 256.

**ATTORNEY AT LAW. (Authority to release.)** The attorney of record, in a suit against the maker of a note, has no authority from his employment as attorney, to execute a valid release to an indorser of the same note to render him a competent witness. *York Bank v. Appleton*, 5 Shepley, 55.

2. (*Same.*) The attorney of record, acting in a suit, has no power as such to release the liability of a witness to pay a part of the costs of the suit. *Springer v. Whipple*, 5 Shepley, 351.

**BAIL. (When allowed on criminal charge.)** Where a crime is charged, which is short of a capital felony, the judges are bound

to admit the prisoner to bail; but, where a capital felony is charged, and the proof of it is evident, or the presumption great, no power exists anywhere to admit to bail. *Commonwealth v. Keeper of prison*, 2 Ashmead, 227.

2. (*Same.*) A safe rule, where a malicious homicide is charged, is to refuse bail in all cases where a judge would sustain a capital conviction, if pronounced by a jury on such evidence of guilt as was exhibited to him on the hearing of the application to admit to bail; and in instances where the evidence for the commonwealth is of less efficacy, to admit to bail. Hence, where a judge is satisfied, that the offence at most is only murder in the second degree, the prisoner is entitled to be liberated on bail. *Ib.*

**BAILMENT.** (*For hire.*) If one hire a carriage and horses to go a journey, and the owner send his own driver, and the horses are injured by immoderate driving, the person who hired them is not liable to the owner for damages. *Hughes v. Boyer*, 9 Watts, 556.

2. (*Same.*) In such case, the hirer incurs no responsibility for any injury happening to the carriage or horses, unless such injury have occurred from some act or interference of his. A driver sent by the owner is his servant, and unless the hirer causes the driver to go beyond the contract of hiring, he will not be liable for the acts of the driver occasioning injury to the carriage or horses. *Quere*, whether he be liable for injuries done to third persons, by the act of the driver? *Ib.*

**BEQUEST.** (*To wife.*) In Pennsylvania, every bequest to the wife is conditional by force of the statute, which declares that every legacy to her shall be in lieu of dower if the contrary be not expressed; and thus standing as if a surrender of her dower had been expressly prescribed by the testator, she is not a volunteer, but a purchaser. *Reed v. Reed*, 9 Watts, 263.

**BILLS OF EXCHANGE AND PROMISSORY NOTES.** (*Fraud in drawing check.*) If the maker of a check, payable instantly, has no funds at the time in the bank upon which it is drawn, it is, when unexplained, deemed a fraud; and the holder can

- sustain an action upon it, without presentment for payment, or notice. *True v. Thomas*, 4 Shepley, 36.
2. (*Grace*.) Where the maker of a note is entitled to grace, the indorser has the same privilege. *Central Bank v. Allen*, 4 Shepley, 41.
3. (*Place of payment*.) Where a note is made payable at a particular bank, and before the day of payment arrives, that bank has no place of business, and ceases to exist, and another bank does business in the same room; if it be necessary to make a presentment of the note for payment, it is sufficient, if made at that room. *Ib*.
4. (*Same*.) Where a note is made payable at a particular place, the reply which is there made on presentment for payment, is admissible in evidence. *Ib*.
5. (*Residence of maker*.) Where the maker of a note has removed before it falls due, and his residence cannot be ascertained by reasonable diligence, if it be necessary to make a demand, it may be made at his former residence. *Ib*.
6. (*Same*.) The replies made on inquiry for the maker's place of abode, are admissible in evidence. *Ib*.
7. (*Records of notary*.) In an action on a promissory note, or inland bill of exchange, the original records of a deceased notary public are admissible in evidence to prove demand and notice. *Homes v. Smith*, 4 Shepley, 181.
8. (*Same*.) A copy of the record of a deceased notary, duly attested by the clerk of the court in the county where such record is filed, is admissible in evidence to prove demand and notice, under stat. 1821, c. 101, "concerning notaries public." *Ib*.
9. (*Same*.) The statute requires all copies furnished by the notary to be under his hand and seal; but it does not require, that the record itself should be under seal, or that the clerk of the court should affix a seal to his copies thereof. *Ib*.
10. (*Same*.) Although the records of a notary public are admissible to prove demand and notice, yet in Maine they are not the only evidence, but the facts may be proved by other testimony. *Ib*.

11. (*Same.*) If a bill be drawn in Maine on drawees in another state, the notarial protest is admissible in evidence. *Clark v. Bigelow*, 4 Shepley, 246.
12. (*Waiver of demand, &c.*) Where W. A., the payee of a negotiable note then payable, indorsed it thus, "W. A. holden, Aug. 11, 1836," he was held liable without demand or notice. *Bean v. Arnold*, 4 Shepley, 251.
13. (*Indorser.*) Each indorser of a promissory note is entitled to one day for giving notice to the party next liable; but the time is to be calculated from the day on which the notice was in fact received, and is not enlarged, if he has received notice earlier than might in strictness have been required. *Farmer v. Rand*, 4 Shepley, 453.
14. (*Waiver of notice.*) The words, "we waive all notice on the promiser and indorsers, and guaranty the payment at all events," written by the indorser of a note over his name, are a waiver of both demand and notice. *Farmer v. Sewall*, 4 Shepley, 456.
15. (*Usury.*) The sale of a negotiable note, free from usury when made, at a greater discount than legal interest, is not conclusive evidence of usury, although the party making the sale is unconditionally liable by his indorsement. *Ib.*
16. (*Loss of.*) If a negotiable note, indorsed in blank by the payee, be lost by the indorsee, and he afterwards assigns to another his right thereto, the assignee cannot maintain an action at law in his own name upon such lost note. *Willis v. Cressey*, 5 Shepley, 9.
17. (*Waiver of notice.*) A waiver by an indorser of a note of all right to notice, does not excuse the holder from making a demand upon the maker. *Burnham v. Webster*, 5 Shepley, 50.
18. (*Action on.*) Where a demand was made by the payee of a note upon the maker at eight o'clock on the morning of the day on which the note became payable, and payment not being then made, a suit was immediately commenced thereon; it was held, that the action was prematurely brought, and could not be maintained. *Lunt v. Adams*, 5 Shepley, 230.
19. (*Payable to married woman.*) A note made payable to a

married woman, is in law a note to the husband, and becomes instantly his property ; and her indorsement transfers no property in the note. *Savage v. King*, 5 Shepley, 301.

20. (*Signature of. — Assignment providing for.*) If the payee of a negotiable note give his assent by his signature to an assignment, wherein provision is made for the payment of the note, or of a part of it, this does not destroy the negotiable character of the note, or destroy a contract made in contemplation of a sale of it, and it may be afterwards legally transferred, although the effect may be to make the signature to the assignment ineffectual, unless adopted by the indorsee. *Hilton v. Southwick*, 5 Shepley, 303.
21. (*Place of notice.*) If a person direct the messenger of a bank to leave his notices at a certain place, a notice to him, as indorser of a bill, left by the messenger at that place, will be deemed sufficient, until the direction is countermanded, or the messenger is otherwise directed. *Eastern Bank v. Brown*, 5 Shepley, 356.
22. (*Left in bank for collection.*) Where a bill is left in a bank for collection, although the bank has no interest in it, yet for the purposes of making a demand, and of receiving and transmitting notices, they are to be considered the real holders. *Warren v. Gilman*, 5 Shepley, 360.
23. (*Same.*) In the negotiation of this business, the cashier is the regularly authorized agent of the bank ; and any communications affecting them are properly addressed to him in his official capacity. *Ib.*
24. (*Same.*) A notary employed for that purpose by the cashier of a bank, to which the bill has been indorsed and transmitted for collection only, has sufficient authority to make a demand, and to give notice. *Ib.*
25. (*Notice to indorser.*) If due notice of the presentment and non-payment of a bill be given to an indorser, it is not necessary that he should also be notified that the holder will look to him for payment. *Ib.*
26. (*Same.*) Where a bill which was drawn, accepted and in-

dorsed by residents of Bangor and made payable at a bank in Boston, was indorsed to a bank in Bangor, and by that bank indorsed and transmitted to a bank in Boston for collection, and was by direction of the cashier of the latter bank duly presented there for payment by a notary, and notices thereof and of non-payment were immediately made out by him to all the prior parties, and transmitted by the first mail to the cashier of the Bangor bank; and where on the same morning the notices reached Bangor, the cashier took them from the post-office, and directed one to the indorser, then a resident of that city, and immediately replaced it in the post-office; it was held, that as the notice came from the notary in Boston, that this mode of transmitting it was sufficient. *Ib.*

27. (*Same.*) Where the indorser of a note is notified of the demand and the default of the maker by mail, the notice must be put into the post-office on the day of the demand, or in season to be sent by the first mail of the succeeding day. *Goodman v. Norton*, 5 Shepley, 381.

28. (*Promise by indorser.*) If the indorser of a note, when he knows that no demand has been made upon the maker, promises to pay it, he will be liable. *Davis v. Gowen*, 5 Shepley, 387.

29. (*Same.*) But the plaintiff must prove affirmatively that the indorser knew that there had been no demand. *Ib.*

30. (*Same.*) Such knowledge cannot be inferred from the mere fact of the promise to pay. *Ib.*

31. (*Same.*) If it be proved that the indorser knew, at the time of the promise, that no demand had been made, it is to be presumed that it was done with a knowledge of his legal rights. *Ib.*

32. (*Notice by notary.*) Where a bill had been drawn and dated in Philadelphia by C. & H., who resided at the time in Montgomery, in Alabama, upon a certain firm in Mobile, in Alabama, it was held that a protest by a notary in Alabama, under his seal, stating that he had given notice to the drawers, was not sufficient evidence of the notice; and that a letter put into the

post office by the notary, addressed to C. & H., at Philadelphia, was not a sufficient notice. *Filler v. Norris*, 6 Wharton, 406.

33. (*Equities.*) Although the taking of the note of a third person as collateral security for a pre-existing debt, without more, will not place the taker in the situation of a holder for value, so as to protect him against the equities subsisting between the original parties to the note; yet it is otherwise if there is a new and distinct consideration — as if time be given in consideration of obtaining the note as security for the debt, &c. *Depeaux v. Waddington*, 6 Wharton, 220.

34. (*Consideration.*) The plaintiffs, who were creditors of A. to the amount of \$1500, held as security for the debt a bond given by a third person to A. for about \$2400. A. applied to them for the bond, alleging that he had an opportunity of getting the money upon it, and would with the proceeds pay the amount of his debt to them. The bond was delivered to A. upon this understanding. A few days afterwards A. paid the plaintiffs \$800 in cash, and gave them a note drawn by the defendant in his favor for \$983, as security for the balance. *Held*, that under these circumstances the note of the defendant was taken upon a sufficient consideration, and therefore that the plaintiffs were entitled to recover against the defendant, although there was no consideration between him and A. *Ib.*

BOND. (*Conditional signature.*) If the obligor in a bond, so written that it appears to have been contemplated by the parties that it should be signed by several, sign and seal the paper, and at the same time annex a reservation or condition to his act, that it shall not be binding upon him, unless signed by the other obligors named, he will not be bound by it, unless signed also by the others named as obligors; but if the bond be signed and delivered without any condition or reservation annexed, although under an expectation, that it would be signed by the others, it is his deed, and it will be binding upon him, although the others do not sign it. *Haskins v. Lombard*, 4 Shepley, 140.

2. (*Amount of damages.*) In action on a bond with a penalty, judgment should be rendered for the amount of the penalty, and

execution should issue for all damages sustained at the time of the rendition of judgment. *Gardner v. Niles*, 4 Shepley, 279.

3. (*Action on.*) If a bond for the conveyance of land upon certain conditions be assigned by the obligee, and the obligor upon the back of the bond agree under his hand and seal with the assignee by name, to extend the time of performance, limited in the condition of the bond; an action thereon cannot be supported by the assignee in his own name. *Cole v. Bodfish*, 5 Shepley, 310.

4. (*Joint or several.*) Where the penal part of a bond, signed by six obligors, is joint in its terms, containing nothing indicating a several interest, or a several liability, and the condition recites the several agreement of each to secure a certain proportion of a specified sum of money by certain notes, to be further secured by a mortgage on a township, subject to a prior mortgage, and concludes by saying, "if we shall well and truly keep and perform our said several agreements, then this obligation is to be void as to each one so performing, otherwise to remain in full force; it is the joint bond of all the obligors. *Clark v. Winslow*, 5 Shepley, 349.

5. (*Misrecital.*) Such a misrecital of the record, as the omission in a bond, taken by the sheriff on a *capias ad respondendum*, of the name of one of the defendants therein, is an immaterial variance, and consequently will not vitiate the bond. *Kelly v. Commonwealth*, 9 Watts, 43.

**COLLISION.** (*Mutual negligence.*) It is an undoubted rule that for a loss arising from mutual negligence, neither party can recover in a court of common law. *Simpson v. Hand*, 6 Wharton, 311.

2. (*Same.*) And this rule governs the case of shippers of goods on board of vessels which have come into collision, to the injury of the goods, as well as the owners of the vessels themselves. *Ib.*

3. (*Same.*) An action cannot be maintained, therefore, by the owner of goods on board of a vessel, against the owners of another vessel, to recover damages for an injury done to the



goods by the collision of the two vessels; if there have been mutual negligence in the conduct of those who have had the vessels in charge. *Ib.*

4. (*Same.*) In an action to recover damages for an injury to goods on board of a vessel while she was lying at anchor in the river Delaware, by a vessel coming up the river in the night time, it was held that if the anchored vessel was moored in the channel without a visible light burning at the time, or if her watch was not on deck, and did not do what was customary for the purpose of avoiding a collision, there was such negligence as to bar the action, though there might have been negligence on the other side; and that the burthen of proof lay upon the plaintiff. *Ib.*

**COMMON CARRIER.** (*Limitation of responsibility*). The common law responsibility of a carrier may be abridged by the special terms of the acceptance of the goods; but these are exceptions which leave the common law rule in force as to all beside, and, it being the business of the carrier to bring his case distinctly within them, they are to be strictly interpreted. *Atwood v. Reliance Trans. Co.*, 9 Watts, 87.

2. (*Same.*) Excepted "dangers of the navigation" of a public canal, are such as are incident to it when the trip is made in conformity to the public regulations, of which the carrier is bound to take notice; consequently damage from bilging in a lock which was entered in contravention of the rules must be compensated by him. *Ib.*

**COMPLAINT.** (*Oath*). Where criminal prosecutions originate, under a statute, on complaint, one under oath or affirmation is implied, as a part of the technical meaning of the terms. *Campbell v. Thompson*, 4 Shepley, 117.

**CONDITION.** (*When conditional limitation*). If a condition subsequent be followed by a limitation over, in case the condition is not complied with, or there is a breach of it, it is termed a conditional limitation, and takes effect without any entry or claim, and no act is necessary to vest the estate in the party to whom it is limited. *Stearns v. Godfrey*, 4 Shepley, 158.

**CONSPIRACY.** (*Nature of*). A conspiracy is in its nature a

joint offence; less than two persons cannot be accused of it; and where this offence is charged, the court cannot award a separate trial. *Commonwealth v. Manson*, 2 Ashmead, 31.

2. (*Same.*) To make a conspiracy an indictable offence, there must be either a direct intention that injury shall result from it, or the object must be to benefit the conspirators to the prejudice of the public, or the oppression of individuals. *Commonwealth v. Ridgway*, 2 Ashmead, 247.
3. (*Same.*) The vital principle, in a charge of conspiracy, is the fraudulent and corrupt combination between the alleged confederates in crime; and the combination must be proved either by direct evidence, or through the exhibition of such circumstances as necessarily tend to its establishment. *Ib.*

CONTRACT. (*Place of delivery.*) If no place be appointed in the contract for the delivery of specific articles, it is the duty of the debtor to ascertain from the creditor where he would receive them; and if this be not done, the mere fact that the debtor had the articles at his own dwelling-house at the time, furnishes no defence. *Bean v. Simpson*, 4 Shepley, 49.

2. (*Parol — for the purchase of lands.*) Payments made under a parol contract for the purchase of land cannot be reclaimed so long as the seller is not in fault; but if he, without any justifiable cause, repudiate the contract and refuse to be bound by it, a right of action will accrue to the purchaser to recover back the money paid, to the extent required by the principles of justice and equity. *Richards v. Allen*, 5 Shepley, 296.
3. (*Same.*) If the purchaser under such parol contract enter into the possession of the land, the amount of the benefit received by him from the occupation should be deducted from the money paid. *Ib.*
4. (*Same.*) If the seller convey the land to a third person, and thus by his own act deprive himself of the power of fulfilment of such parol contract, it excuses the purchaser from the necessity of making a tender of the remaining purchase money, and demanding a deed. *Ib.*
5. (*Same.*) The cause of action does not accrue to the purchaser

under such parol contract, until the seller is in fault, and therefore the statute of limitations begins to run only from that time.

6. (*Place of performance.*) The presumption of the law is, that a contract is intended to be performed in the place or country in which it is made, if there be not an express agreement or necessary implication that it is to be performed elsewhere; and whenever such understanding is not apparent, the law of the contract is the law of the place where it was made. *Allhouse v. Ramsay*, 6 Wharton, 331.

7. (*Same.*) On a contract made in one state of the union for the payment of money, the debtor is not bound to go to another state to tender the money to the creditor. *Ib.*

8. (*Law of.*) Where A. residing in Pennsylvania, had obtained a judgment against B., who resided in New Jersey, and the defendant, who also resided in New Jersey, made a verbal promise to pay the money for B. if A. would wait a certain time: it was held, that this promise was void under the statute of frauds of New Jersey, and that an action could not be maintained upon it against the defendant in the courts of Pennsylvania. *Ib.*

9. (*Time is.*) Parties contracting for the purchase and sale of land may make the time of payment of the purchase-money essential to the contract, so that if the money be not paid at the times stipulated, the contract shall be null and void; and the vendee cannot compel its specific execution, although previously in part performed. *Dauchy v. Pond*, 9 Watts, 49.

CONVEYANCE. (*Boundary agreed.*) Where the parties to a conveyance agree upon and mark out a line of boundary, and the possession is in accordance with it for such length of time as may give a title by disseizin, the line cannot be disturbed, although found to have been erroneously established, unless there be clear proof that the possession was not adverse. *Moody v. Nichols*, 4 Shepley, 23.

2. (*Same.*) The declaration of the grantee, made to a third person more than twenty years after the line was agreed on by the

parties, that he claimed no more than the number of acres stated in the deed, and that if he had more in his possession it was occasioned by mistake, without any acts of either party, can have no influence upon their rights. *Ib.*

3. (*Same.*) Where land is described in a deed by boundaries on three sides, and is to extend west so far as to include a certain number of acres, and the parties to the deed afterwards agree upon and mark that line, and a fence is erected thereon, and the possession is according to it for many years, and no other line is known between them; and the grantor then makes a deed of land to another person, describing it repeatedly as bounding on that side, upon the west line of land previously sold; no land passes by this deed east of that line. *Ib.*

4. (*Construction.*) If the proprietor of land on which are a mill and mill privilege grant to one son "the use, privilege and benefit of one half of a saw-mill," and on the same day grant to another son a tract of land, including that whereon the mill stood, "excepting the privilege of one half of a saw mill conveyed to" the other son, "and his heirs;" the grant and the reservation are to be construed together to ascertain the intention of the parties; and one half of the mill and mill privilege pass by the grant. *Moore v. Fletcher*, 4 Shepley, 63.

5. (*Mill privilege.*) The words, mill privilege, or the privilege of a mill, in a grant, are to be understood as meaning the land on which the mill and its appendages stand and the land and water then actually and commonly used with the mill and necessary to the enjoyment thereof. *Ib.*

6. (*Same.*) The omission to use a portion of the mill yard for a single year will not prevent its becoming a part of it by appropriation and long use. *Ib.*

7. (*Same.*) Nor can the quantity of land be lessened by proof, that the mill might have been well used by the occupation of less land, than was in fact used. *Ib.*

8. (*Thread of a river.*) The general rule is, that lands bounded upon rivers or streams of water extend to the thread of the stream, unless the description be such as to show a different intention. *Nickerson v. Crawford*, 4 Shepley, 245.

9. (*Same.*) And if land be described in the grant as extending from a road northerly "to the margin of the cove, thence westerly along the margin of the cove about eleven rods," and thence southerly to the road; the land granted extends but to the edge of the water and the flats are not included. *Ib.*
10. (*Distance.*) Where no monuments are named in a grant, and none are intended to be afterwards designated as evidence of the extent of it, the distance stated therein must govern. *Machias v. Whitney*, 4 Shepley, 343.
11. (*Survey.*) But where the legislature make a grant, and require by the terms of it, that an actual survey shall be made, so that the land granted may be designated upon the earth and separated from the ungranted land, and that the survey and plan shall be returned and accepted by the grantors before the title passes to the grantee, and the survey is made, and the plan is returned and accepted; the extent of the grant is to be determined by the actual location upon the earth. *Ib.*
12. (*Same.*) Where there is an excess of measure in an ancient survey and location of a grant, amounting to one seventeenth part, although it is the province of the jury to decide what circumstances occasioned the excess, and what was the intention of the party making it, and to determine whether there was fraud or not; yet the mere fact of the existence of such excess will not warrant the jury in drawing the inference that there was fraud. *Ib.*
13. (*Thread of a river—Millpond.*) If the line of land conveyed be described as commencing at a stake by the side of a mill pond, which pond is caused by a dam across a fresh water river overflowing its banks in the spring but admitting all the water within the channel of the river in the summer, and from thence running from the pond and returning to another stake "by the side of the river or mill pond," and running "by the said pond to the first mentioned bounds;" the grant extends to the thread of the river. *Lowell v. Robinson*, 4 Shepley, 357.
14. (*Same.*) And if the description be "running by the side of the mill pond," the land overflowed in the spring passes by the grant. *Ib.*

15. (*Monument.*) Where boundaries, length of lines and points of compass are all given in a deed, and the first-named monument cannot be found, but the others are ascertained; the first monument may be ascertained, in the absence of all other testimony, by beginning at the second monument and running back the number of rods mentioned in the deed in the direction there given. *Seidensparger v. Spear*, 5 Shepley, 123.
16. (*Mills and dam.*) Where the owner of land flowed by a mill dam sells the mills and dam and retains the land, the right to flow the land to the extent to which it was then flowed, without payment of damages, passes by the grant; but where the owner sells the land flowed, and retains the mills and dam without reserving the right to flow, he is not protected from the payment of damages. *Preble v. Reed*, 5 Shepley, 169.
17. (*Grant of mill.*) The grant of a saw-mill and grist-mill carries also the use of the head of water necessary to their enjoyment, with all incidents and appurtenances, as far as the right to convey to this extent existed in the grantor. *Rackley v. Sprague*, 5 Shepley, 281.
18. (*Same.*) If such grant cannot be beneficially enjoyed without causing the water to flow back upon other lands of the grantor, a right to do this passes to the extent to which it has been flowed before the grant, by which all privies in estate under the grantor are bound. *Ib.*
- CORPORATION. (*At common law.*) Corporations originating according to the rules of the common law must be governed by it in their mode of organization, in the manner of exercising their powers, and in the use of the capacities conferred; and when one claims its origin from such a source, its rules must be regarded in deciding upon its legal existence. *Penobscot Boom Corp. v. Lamson*, 4 Shepley, 224.
2. (*By legislative act.*) But the legislature may create a corporation, not only without conforming to such rules, but in disregard of them; and when a corporation is thus created, its existence, powers, capacities, and the mode of exercising them, must depend upon the law creating it. *Ib.*

3. (*Defence against action by.*) In an action by a corporation, the defendant cannot take advantage of any abuse or misuse of the corporate powers, not applicable to the question in controversy; or object that no mode of service, or of attachment, or means of redress or relief, against such corporation is provided. *Ib.*
4. (*Right of shareholder.*) Where an individual stockholder therein has money of a corporation in his hands, accruing from a sale of corporate property, another shareholder cannot recover his proportion of it in an action for money had and received. *Hodsdon v. Copeland*, 4 Shepley, 314.
5. (*Same.*) But if the corporation assent to a sale of its property by one of its members, and to a distribution of the proceeds of such sale among the holders of the shares, each may recover his proportion thereof in an action against the holder of the money. *Ib.*
6. (*By laws of the states.*) Private corporations existing by the laws of other states have power to sue in their corporate name in Maine, but their existence must be proved by satisfactory evidence, like any other material facts. *Savage Manuf. Co. v. Armstrong*, 5 Shepley, 34.
7. (*Existence of.*) If the defendant in an action brought in the name of a corporation would deny its existence, he must do it by plea in abatement, as pleading to the merits admits the competency of the plaintiffs to sue in the name assumed. *Ib.*
8. (*Books of.*) The books of a corporation are the regular evidence of its corporate acts. *Coffin v. Collins*, 5 Shepley, 440.
9. (*Same.*) Where the records of a corporation are in existence and can be obtained, parol evidence is inadmissible to prove the acceptance of the charter, or to prove what persons are members of the corporation. *Ib.*
10. (*Forfeiture of charter.*) As a general rule, a corporation may forfeit its charter by misuser or nonuser, judicially ascertained, viz., by *scire facias*, where an existing corporation abuses its powers; and by *quo warranto*, where a corporation *de facto* assumes authorities which do not pertain to it. *Commonwealth v. Bank of the U. States*, 2 Ashmead, 349.

11. (*Acceptance by.*) In a proceeding penal in its character, the fact of the acceptance of a law, by a corporation, must be in some way affirmatively shown to the satisfaction of the court; and an acceptance of it cannot be inferred, upon which to ground a forfeiture of its charter. *Ib.*
12. (*Foreign.*) Trustees of a foreign corporation, appointed by a court of equity, may maintain an action in their own names, upon a negotiable note, which came to their hands with the other assets of the institution. *Stewart v. Insur. Co.*, 9 Watts, 126.
13. (*Same.*) A foreign corporation may maintain an action in its own name, or that of its trustees, in the courts of Pennsylvania. *Ib.*

COURT. (*Adjournment.*) A day to which a court was adjourned is part of the same term at which the adjournment was made. *Leib v. Commonwealth*, 9 Watts, 200.

COVENANT. (*Joint or several.*) If a covenant be by several with one, if the interest be separate, and the performance cannot be made jointly, the covenant must be regarded as several, unless the intention of the parties appears to have been, that each should be bound for the performance of the other. *Haskins v. Lombard*, 4 Shepley, 140.

2. (*Same.*) Where three convey lands in the same deed, covenanting to warrant and defend the premises against the lawful claims and demands of all persons claiming by, through, or under them, they are all liable on the covenant, if a legal claim under one of the three existed at the time. *Carleton v. Tyler*, 4 Shepley, 392.
3. (*Independent.*) By articles of agreement under seal between the plaintiff and defendant, the defendant agreed to take a certain portion of a railroad contract, which the plaintiff had entered into with a railroad company, at a certain rate, and to pay the plaintiff a certain sum for it; and the plaintiff agreed to give the defendant a power of attorney to do all business pertaining to the contract if accepted by the company: Held, that these were independent covenants, and that it



was not necessary for the plaintiff to prove that he had given or offered to give the defendant the power of attorney mentioned in the agreement. *Quinlan v. Davis*, 6 Wharton, 169.

**DAMAGES.** (*Loss of time.*) In an action to recover the price of machinery made by the plaintiff for the defendant, where the defence and evidence are that the machinery is defective, if the defendant have procured the machinery to be made good, the time necessarily lost in the process, unless so small as to fall within the maxim *de minimis, &c.* would be a legitimate subject of compensation; though time lost by working on with it in a defective condition would not be. *Cumming v. Garside*, 6 Wharton, 299.

2. (*Foreseen causes.*) In an action for a nuisance created by obstructing a stream made navigable by law, if it appear that the injury to the plaintiff arose from causes which might have been foreseen, such as ordinary periodical freshets or the collection of ice, the whose superstructure is the immediate cause of the mischief shall be liable to damages; but if the injury be occasioned by an act of providence, which could not have been anticipated, the defendant will not be liable. *Bell v. McClinton*, 9 Watts, 119.

**DEATH-BED DECLARATIONS.** (*When admissible in evidence.*) To make death-bed declarations admissible in evidence, they must proceed from a person under apprehension of impending dissolution; and a sense of impending death existing in the mind of the declarant is a prerequisite to the admission of death-bed declarations in evidence. *Commonwealth v. Williams*, 2 Ashmead, 69.

2. (*Same.*) It is not essential that the sense of impending death should be expressed by the dying man himself; but it may be collected either from the circumstances of the case, as the nature of the wound and state of the body, or from expressions used by the deceased. *Ib.*

3. (*Same.*) Of the existence of the consciousness of approaching death, the judge who tries the cause must be satisfied, before he admits such declarations in evidence. *Ib.*

4. (*Same.*) Where declarations are offered in evidence against a defendant, made by one most mortally wounded, as to who was the perpetrator of the injury and the facts which attended it, *prima facie* evidence is submitted to the judge, that they were made under a consciousness of impending death, and then the evidence is received, and left to the jury to determine whether the deceased was really in such circumstances, or used such expressions, from which the apprehension in question was inferred. *Commonwealth v. Murray*, 2 Ashmead, 41.

5. (*Same.*) The consciousness of death may be inferred by the judge from the nature of the wound, or state of illness, or other circumstances of the case, although the deceased may not have expressed any apprehension of danger. *Ib.*

DEED. (*Good title.*) A contract to make and execute "a good and sufficient deed to convey the title to said premises," is not performed, unless a good title to the land passes by the deed. *Hill v. Hobart*, 4 Shepley, 164.

2. (*Priority of register.*) Where two deeds, dated and acknowledged at different times, are recorded upon the same day, their priority of registry must be determined by the record alone, and no parol evidence is admissible to show which was first received. *Hatch v. Haskins*, 5 Shepley, 391.

3. (*Same.*) The order in which deeds are entered upon the book of records furnishes no evidence that one was received prior to the other. *Ib.*

4. (*Same.*) Where, so far as it respects the record, the rights under two deeds are equal, the title under the one first made is not defeated or impaired by such registry of the second; but to give the second deed priority, it must be first recorded. *Ib.*

5. (*Delivery.*) As the possession and production of a deed by the grantee is *prima facie* evidence of its having been delivered, so if it be found in the hands of the grantor, the presumption arises that no delivery has been made. *Ib.*

6. (*Registry.*) The registry of a deed, without acknowledgment, is illegal, and confers no priority, and gives no rights. *De Witt v. Moulton*, 5 Shepley, 418.

7. (*Same.*) Where a deed is illegally registered, it is not constructive notice to third persons, and should not be admitted in evidence to affect their rights. *Ib.*

**DEPOSITIONS.** (*Leading question.*) Where depositions are taken before a magistrate, with notice to the opposing party, objections to the form of the questions as leading must be made at the time the questions are put, or they will be considered as waived; and if the opposite party neglects to attend at the taking, he cannot make such objections at the trial. *Rowe v. Godfrey*, 4 Shepley, 128.

2. (*Taken in other states.*) If the oath be duly administered, there is a want of accuracy and formality in the return of the magistrate, living in another state, and taking the deposition there under a *dedimus* issued from the court of common pleas, under the stat. 1821, c. 85, sec. 7, that court has power to admit the deposition in evidence or to reject it. *Haley v. Godfrey*, 4 Shepley, 305.

**DIVORCE.** (*Judgment in former libel.*) Where a libel for divorce for the cause of adultery, alleging that the offence was committed with divers persons, some of whom are named, and some are said to be unknown, within a specified time, has been tried, and thereupon judgment has been duly rendered that the libel was not sustained; such judgment, while it remains in force, is a bar to any after libel for offences committed within the period alleged in the first libel. *Vance v. Vance*, 5 Shepley, 203.

2. (*Same.*) But if the last libel alleges that the offences were committed within a certain period, including time prior and subsequent to the filing of the first, and it does not appear that the causes of complaint were the same in both, the judgment is no bar to such offences as may be proved to have been committed after the filing of the first libel. *Ib.*

**DONATIO CAUSA MORTIS.** (*What is essential to.*) It is essential to a good gift *causa mortis*, that the donor should make it in his last illness, and in contemplation and expectation of death; and if he recover, the gift becomes void. *Weston v. Hight*, 5 Shepley, 287.

2. (*Expectation of death.*) Where the gift was made while the donee was in expectation of immediate death from consumption, and he afterwards so far recovered as to attend to his ordinary business for eight months, but finally died from the same disease; such gift cannot be supported as a *donatio causa mortis*.  
*Ib.*

3. (*Indorsement of a note.*) The indorsement of a promissory note by the donee, cannot be the subject of a gift *causa mortis*, so as to render his estate liable on his indorsement. *Ib.*

DURESS. (*By lawful imprisonment.*) A lawful imprisonment is no duress. *Eddy v. Herrin*, 5 Shepley, 338.

2. (*Same.*) Where the defendant was induced, from the threat of a lawful imprisonment upon a warrant for an assault and battery upon the plaintiff, to submit to others the amount to be paid as a satisfaction for the injury, and also to give a note for the amount thus ascertained, such note cannot be avoided for duress. *Ib.*

3. (*Same.*) But had the note been obtained from threats of an unlawful imprisonment, it might have been avoided. *Ib.*

EDUCATION. (*Allowance for.*) Although courts of equity recognise the common law obligation of a father to support his children, and generally refuse to assist him from their private estates; yet, where he is without any means, or without adequate means to maintain and educate them, according to their future expectations in life, equity will interpose, and make him an allowance out of the estate of his children for that purpose. *Newport v. Cook*, 2 Ashmead, 332.

2. (*Same.*) In a case of clear and manifest urgency, a court of chancery will not hesitate in breaking into the principal of a vested legacy, for the purposes of educating an infant legatee.  
*Ib.*

ENDORSER. (*Of instrument not negotiable.*) A blank endorsement of a note, in its terms not negotiable, after it becomes due and payable, creates such a liability of the endorser, that the endorsee may maintain an action against him in his own name. *Leidy v. Tammany*, 9 Watts, 353.

**ENTRY.** (*On land.*) An entry upon land will avoid the operation of the statute of limitations ; but it must be accompanied by an explicit declaration, or an act of notorious dominion, by which the claimant challenges the right of the occupant. *Alimus v. Campbell*, 9 Watts, 28.

**EQUITY.** (*Fraudulent agent.*) If one undertakes to procure a deed of land for another, who pays the consideration therefor in accordance with a previous agreement, but fraudulently takes the conveyance to himself, such agent may be compelled by bill in equity to convey the land to him who made the contract and paid the consideration. *Pillsbury v. Pillsbury*, 5 Shepley, 107.

**EVIDENCE.** (*Declarations of supposed disseizor.*) The declarations of one setting up a title by disseizin, that he held in subordination to the title of the owner, are admissible in evidence. *Crane v. Marshall*, 4 Shepley, 27.

2. (*Same.*) But his declarations to a stranger to the title, that he held adversely to the owner, are not admissible in evidence to prove a disseizin. *Ib.*
3. (*Document produced on notice.*) If a book or document be called for by a notice to produce it, and it be produced, the mere notice does not make it evidence ; but if the party giving the notice takes and inspects it, he takes it as testimony to be used by either party if material to the issue. *Penobscot Boom Corp. v. Lamson*, 4 Shepley, 224.
4. (*Impressions of witness.*) Where a witness speaks of his impressions, if it be understood, that the fact is impressed upon his memory, but that his recollection does not rise to positive assurance, it will be admissible evidence for the consideration of the jury ; but if the impression be not derived from recollection of the fact, and be so slight, that it may have been derived from the information of others, or some unwarrantable deduction of the mind, it cannot be received. *Clark v. Bigelow*, 4 Shepley, 246.
5. (*Release by part.*) In an action of assumpsit by several plaintiffs, where they call a witness who is objected to as in-

terested in the event of the suit, a release under seal, although executed by but part of them, discharges the joint interest, and renders the witness competent. *Haley v. Godfrey*, 4 Shepley, 305.

6. (*Discrediting one's own witness.*) The rule that a party cannot discredit his own witness, by proving that he had made contradictory statements at other times, does not apply to those cases where the party is under the necessity of calling the subscribing witnesses to an instrument. *Dennett v. Dow*, 5 Shepley, 19.
7. (*Same.*) Where the party in favor of establishing a will calls a subscribing witness to the execution thereof, who on examination expresses an opinion unfavorable to the soundness of mind of the testator, and testifies to facts tending to prove the same, the party calling him may prove that such subscribing witness had before expressed opinions and made statements contradicting the testimony then given, and that he had in the same case testified differently in a former hearing. *Ib.*
8. (*Competency of witness.*) If the depository of papers assume the execution of the trust, he becomes responsible to any party who may suffer by the violation of it; his interest is balanced, and he is a competent witness for either party. *Lewis v. Hodgdon*, 5 Shepley, 267.
9. (*Same.*) If a witness expects that he will be relieved from responsibility to the plaintiff by the suit, and therefore advised the bringing of it, when in fact his liability is not changed by the result of such suit, he is a competent witness. *Ib.*
10. (*Cross-examination.*) When a witness has been called by one party and examined on some points, the other party may cross-examine him in relation to facts material to the issue, other than those elicited by the party calling him; and if the answers are not satisfactory, he may by any legal proof contradict or discredit them. *Ib.*
11. (*False testimony.*) The rule that if a witness testifies falsely as to any one material fact, the whole of his testimony must be rejected, is not of such binding effect as to authorize the court

- to instruct the jury, that they cannot believe one part of his statement and disbelieve another. This is but a presumption of law, and cases often occur in which jurors may yield entire credit to certain statements, and disbelieve others. *Ib.*
12. (*Bond of indemnity.*) Giving a bond to an interested witness to indemnify him against his liability, does not render him competent. *Paine v. Hussey*, 5 Shepley, 274.
13. (*Of acceptance of charter.*) Where the records of a corporation are in existence, and may be obtained, parol evidence is inadmissible to prove the acceptance of the charter, or to prove what persons are members of the corporation. *Coffin v. Collins*, 5 Shepley, 440.
14. (*Parol, in case of written instrument.*) Parol evidence of what took place at and immediately before the execution of a written instrument, is admissible to prove fraud or plain mistake in drawing the writing, or to establish a trust, or to rebut an equity. *Scott v. Burton*, 2 Ashmead, 312.
15. (*Same.*) Parol evidence is not admissible to vary the contents of a written instrument, even in the case of a clear departure from instructions, where it would affect the interests of third persons, uninformed of the facts, and who have *bona fide*, and for a valuable consideration, acquired rights under it. *Ib.*
16. (*Comparison of hands.*) The doctrine in Pennsylvania is, that mere unaided comparison of hands is not in general admissible. But after evidence has been given in support of a writing, it may be corroborated by comparing the writing in question with a writing, concerning which there is no doubt. *Baker v. Haines*, 6 Wharton, 284.
17. (*Same.*) To authorize the admission of the writing offered as a test or standard, nothing short of evidence by a person who saw the party write the paper, or of an admission by such party of its being genuine, or evidence of equal authority, is sufficient. *Ib.*
18. (*Book of entries.*) In an action by a blacksmith to recover for work done, the plaintiff produced a book containing entries, some of which he swore were made by himself not later than

the second day in the evening after the work was done, and were partly taken from a slate, and partly from his own head. A witness was also produced, who testified that he made some of the entries by copying them from the plaintiff's slate on the evening of the day on which they were made, or in the course of the next day. Held, that the book was admissible in evidence.

*Hartley v. Brookes*, 6 Wharton, 189.

19. (*Same.*) A book of entries, manifestly erased and altered in a material point, cannot be considered as entitled to go to the jury as a book of original entries, and ought to be rejected by the court, unless the party offering it gives an explanation which does away with the presumption arising from its face. *Churchman v. Smith*, 6 Wharton, 146.

20. (*Admission of one of several parties.*) Evidence is admissible of admissions made by one of two co-plaintiffs or defendants, respecting material facts within the knowledge of the party making the admissions; but declarations by one of two co-plaintiffs or defendants of what he has heard the other plaintiff or defendant say in regard to the subject-matter of the action, are not admissible. *Quinlan v. Davis*, 6 Wharton, 169.

21. (*Parol, to construe written.*) Parol evidence of the understanding of the parties in relation to the construction of a written agreement, may be given to explain that which is otherwise ambiguous. *Selden v. Williams*, 9 Watts, 9.

22. (*Presumption of fact.*) The nature of a case and its circumstances may raise such a natural presumption of a fact, that it may be submitted to a jury without positive proof. *Snevely v. Jones*, 9 Watts, 433.

#### EXECUTORS AND ADMINISTRATORS. (*Legacy in trust.*)

If a legacy is given in trust, and there is no special designation in the will of the executor or of any other person, as trustee, it belongs to the executor, as such, to administer the estate according to the provisions of the will. *Groton, J. v. Ruggles*, 5 Shepley, 137.

2. (*Same.*) But if the person named as executor is also in the will appointed trustee, he is required by law to give a separate bond in his character of trustee. *Ib.*



3. (*Same.*) And it is his duty to give the bond as trustee without being notified or cited thereto; and his neglecting or refusing so to do is to be considered as declining the acceptance of the trust, and another trustee is to be appointed by the judge of probate in his stead. *Ib.*

**EXTINGUISHMENT.** (*New note.*) The taking of a new note of equal degree, either from the debtor himself or from a stranger, at the instance of the debtor, is not an extinguishment of the first note, nor will it release any indorser of the same, unless the holder agreed to accept the new note in satisfaction, or to give time for the payment of the first note. *Weakly v. Bell and Sterling*, 9 Watts, 273.

**FRAUD.** (*Defence of.*) Where a sale of land has been effected by fraudulent representations, and an action is brought by the purchaser to recover the damages sustained thereby, the commencement and pendency of such suit does not preclude the purchaser from giving evidence of the fraud in defence of an action on a note given as the consideration of the sale. *Whittier v. Vose*, 4 Shepley, 403.

2. (*Payment of purchase money.*) A parol contract, for the purchase of land, is not taken out of the statute of frauds by the mere payment of the purchase money. *Parker v. Wells*, 6 Wharton, 153.

**GRANTS FOR PUBLIC USES.** (*Care and custody of.*) The state of Maine is entitled to have the care and custody of the lands granted by the commonwealth of Massachusetts before the separation for public uses, where the grantees are not yet in existence, and may prosecute for trespasses thereon. *State v. Cutler*, 4 Shepley, 349.

**GUARDIAN.** (*Duty of, in applying money of ward.*) The guardian of a person, *non compos mentis*, who is entitled to a pension from the United States, is not bound to apply the pension money in his hands to the payment of pre-existing debts of his ward. *Fuller, J. v. Wing*, 5 Shepley, 222.

**HABEAS CORPUS.** (*Restraint of liberty.*) Whenever a person is deprived of the privilege of going when and where he

pleases, he is restrained of his liberty, and has a right to inquire if that restraint be illegal and wrongful; and that, whether it be exercised by a jailor, constable, or private individual. *Commonwealth v. Ridgway*, 2 Ashmead, 247.

**HUSBAND AND WIFE.** (*Shares standing in the name of wife.*)

If shares of an incorporated bank stand in the name of the wife, the husband has power to transfer them by his own act. *Winslow v. Crocker*, 5 Shepley, 29.

2. (*Reduction to possession.*) A testator, by his will, gave one moiety of his estate to his son in law, in trust to pay the interest and income thereof to the testator's daughter Elizabeth, during her life, in quarterly payments; and, on her decease, the moiety was to go to his daughter Catharine, (who was the wife of the trustee,) her executors, administrators, and assigns forever. Elizabeth died unmarried in the spring of 1837; and, in October of the same year, Catharine applied for a divorce *a vinculo matrimonii*; which was decreed in April, 1839. From the death of the testator up to the death of the tenant for life, the moiety was in the hands of the testamentary trustee; and, after the death of the tenant for life, he retained it in the same way. Held, by the court, that the circumstances of the case manifested no intent on the part of the husband to reduce the moiety given to his wife into possession; and that, being trustee under the will of her father, he held the fund, not as her husband, but as testamentary trustee; and his simple retention of it, after the death of Elizabeth, as he had held it before, was no reduction into possession during the existence of the marriage, and that he must account to the wife or her representative for it. *Kintger's estate*, 2 Ashmead, 455.

3. (*Effect of divorce.*) A divorce obtained by a wife from her husband places her in the same situation, as to her legal rights, in reference to property owned by her before her marriage, or acquired by her during its continuance, as if she had actually survived her husband. *Ib.*

4. (*Survivorship.*) Legacies are almost uniformly considered as choses in action; and, when given to a married woman, will,

unless received, released, or, perhaps, assigned for a valuable consideration by the husband, survive to the wife on his dying before her. *Ib.*

5. (*Chose in action.*) A chose in action continues to belong to a wife, unless her husband can and does reduce it into possession; and he has not, on the marriage, any immediate property in the chose in action, but only the right to reduce it into possession; and, if he dies, or the marriage contract between him and his wife is legally annulled, before he reduces it into possession, the right of the wife continues just as if she had never been married. *Ib.*
6. (*Same.*) Courts of equity will require it to be shown, by some unequivocal act, on the part of a husband, that he has reduced, and intended to reduce, his wife's choses in action into possession, in order to defeat her right of survivorship; and their leaning is always in favor of securing to a wife "the small chance of preserving her property by survivorship." *Ib.*
7. (*Same — Trustee.*) A court of equity will not presume a trustee guilty of a breach of trust, in order to infer from such breach a reduction, by anticipation, of his wife's choses in action into possession; and it is an axiom of equity, that trustees are always presumed to be executing their trusts faithfully, unless the contrary clearly and unequivocally appears. *Ib.*
8. (*Survivorship.*) Possession by a husband, of his wife's legacy or distributive share, as executor or administrator of the estate from which it has been derived, is not such a reduction into possession as will defeat her right by survivorship. *Ib.*
9. (*Agreement to live separate.*) It is settled that chancery will not execute an agreement between husband and wife to live separate and apart from each other. *M Kennan v. Phillips*, 6 Wharton, 571.
10. (*Same.*) But where an agreement was made between a husband and wife for a separation, and the wife covenanted to relinquish all claim to his estate, and the husband agreed to pay her a certain sum of money; which money was paid to her; and they lived separate from each other, and afterwards she

died, having put the money out at interest : it was held, that she had acquired a separate property in this money, which was subject to her disposition as a *feme sole*. *Ib.*

11. (*Same.*) A wife may acquire a separate property, in equity, by an agreement with her husband without the intervention of trustees. *Ib.*

12. (*Choses in action of wife.*) Neither a court of equity nor a court of law, in Pennsylvania, will lend its aid to a husband who has deserted his wife, to enable him to recover her choses in action, without making a suitable provision for her maintenance ; unless he had, previously to the separation, reduced them into possession ; and the principle is the same in regard to her real estate. *Rees v. Waters*, 9 Watts, 91.

13. (*Bequest.*) "I give and bequeath to my daughter Catharine, married to Samuel Meisenhelter, the eighth part of my estate, to them." *Held*, to be a bequest to the husband and wife, to which the husband, surviving the wife, is entitled. *Hamm v. Meisenhelter*, 9 Watts, 349.

INCUMBRANCE. (*Public road.*) A public road, upon lots of ground which the owner had covenanted to sell and convey, is not such an incumbrance as will entitle the vendee to defalcate from the amount of the purchase-money, in an action of covenant upon the agreement of sale. *Patterson v. Arthurs*, 9 Watts, 152.

INDICTMENT. (*Separate trials.*) In an indictment against several, they are not of right entitled to be tried separately, but are to be tried in that manner only when the court from sufficient cause shall so order it. *The State v. Soper*, 4 Shepley, 293.

2. (*False pretences.*) Where an indictment for cheating by false pretences alleges that the goods were obtained by several specified false pretences, it is not necessary to prove the whole of the pretences charged ; but proof of part thereof, and that the goods were obtained thereby, is sufficient. *State v. Mills*, 5 Shepley, 211.

3. (*Same.*) Where it was proved, on the trial of such indictment,

that the owner of a horse represented to another that his horse, which he offered in exchange for property of the other, was called the Charley, when he knew that it was not the horse called by that name, and that by such false representation he obtained the property of the other person in exchange, it was *held*, that the indictment was sustained, although the horse said to be the Charley was equal in value to the property received in exchange, and as good a horse as the Charley. *Ib.*

INFANCY. (*Waving of rights of.*) Where the defendant, while under the age of twenty-one years, purchased goods and gave his note therefor, and made sale of most of them in the ordinary course of business, and transferred and assigned the residue to secure the payment of a debt; the retaining of these goods for sale by the minor, as the servant of the assignee, until after he became of full age, does not deprive him of the right to set up infancy as a defence to the note. *Thing v. Libbey*, 4 Shepley, 55.

2. (*Renewal of promise at full age.*) If a promise made by an infant be renewed or ratified by the promisor, when at full age, but after the commencement of a suit thereon, that suit cannot be sustained thereby. *Ib.*

INSURANCE. (*Reference to arbitrators.*) Where it is provided, that any dispute arising upon a policy of insurance shall be referred to arbitrators to be mutually chosen by the parties, an action may be sustained upon the policy without any offer to refer. *Robinson v. Georges Ins. Co.*, 5 Shepley, 131.

2. (*Same — salvage.*) Where a vessel has been stranded on a sand-bar, within the United States, and within a hundred miles of the place of holding a court of the United States for the district, and has been put afloat and repaired by salvors, the master has no power to refer the claim for salvage, without the assent of the owners. *Ib.*

3. (*Same.*) And if upon such reference, the arbitrators award more than fifty per cent. of the value of the vessel to the salvors for salvage, and the master of the vessel sell her to pay the salvors, an action cannot be maintained against the insurers for a total loss, without an express abandonment. *Ib.*

4. (*Interest of assured.*) Where the goods of an assured were levied upon by the sheriff by virtue of an execution against him; and the sheriff took actual possession of the goods, and left them in the store of the assured, the doors of which he fastened, and the windows of which he nailed up; and the sheriff went out of town and took the key of the store with him; and during his absence a fire took place, which destroyed the store with its contents: it was held, that the assured was nevertheless entitled to recover. *Franklin Fire Ins. Co. v. Findlay*, 6 Wharton, 483.

INTEREST. (*On arrears of annuity.*) Where a sum of money is set apart and charged upon land, the interest of which is to be paid annually, if it be not punctually paid, the annuitant is entitled to recover interest upon the annuity from the time it was payable. *Addams v. Heffernan*, 9 Watts, 530.

INTESTATE. (*Advancement.*) Questions of advancement depend upon the intention of the parent; and of this, the declarations of the parent at the time, or the admissions of the child, at the time or afterwards, would seem to be evidence. *Dani. Kings's Est.* 6 Wharton, 370.

2. (*Same.*) If there be no evidence at all on the subject, then whether it was a present or an advancement, may be judged by its amount and character. *Ib.*

3. (*Same.*) Where a father, whose estate appeared on the settlement of the accounts of the administrators, after his death, to have amounted to upwards of \$120,000, and who had four children, bought furniture for a daughter, on her marriage, to the amount of \$1132, and there was evidence of his declarations that he had given them to her as a present and a gift; it was held, that she was not to be charged with this as an advancement; but that it was to be considered as a present to her. *Ib.*

JUDGMENT. (*Amendment of record.*) The court in which a judgment is entered, may allow an amendment of the record, as between the parties themselves, and even after a writ of error; but this cannot be done so as to affect the rights of a subsequent judgment creditor, mortgagee or purchaser; nor against bail or

sureties for stay of execution. *Crutcher v. The Comw'th*, 6 Wharton, 340.

**LANDLORD AND TENANT. (*Erections.*)** Where a tenant holding under a written lease erects a furnace for warming the house, thereby making a material alteration of parts of the building, and where the house would be injured by the removal of the furnace; if the tenant does not remove it during his term, he cannot maintain trover against the proprietor of the house for refusing to permit him to enter and remove it afterwards. *Stockwell v. Marks*, 5 Shepley, 455.

2. (*Same.*) Nor can the tenant maintain such suit, if the lease permit him to make any alterations or improvements during his occupancy, provided the same shall not lessen the value of the property, or occasion expense to the lessor. *Ib.*

3. (*Liability of tenant leaving in the midst of his term.*) Where the defendant, a tenant for years, left the premises in the middle of the year, and sent the key to the landlord, who gave notice to the tenant that he should continue to hold him liable for the rent, and then the landlord took possession and offered the house to let; it was held that he might recover from the defendant, in an action for use and occupation, the amount of rent that accrued between the time of his leaving the house and the time that it was again rented. *Marseilles v. Kerr*, 6 Wharton, 500.

4. (*Repairs.*) A lessee may maintain an action against his lessor to recover for money expended in repairs, under an agreement that the lessor would repay it; although the lessee had previously paid rent to the lessor without claiming a deduction for the repairs. *Caulk v. Everly*, 6 Wharton, 303.

**LEGACIES. (*Vested.*)** Where a testator directed that all his grandchildren should have the whole of his estate not otherwise disposed of by his will, equally between them; and that, on the eldest grandchild arriving at the age of twenty-one, his trustees and executors should make a reasonable valuation of his estate, and give to such grandchild his or her proportion, according to such valuation, and the number of grandchildren then living; that, when the second grandchild should arrive at the age of

twenty-one, they should give to such grandchild his or her proportion, according to the same or a new valuation, then to be made, if thought necessary, and so on, in succession, until the final division should be made to the last grandchild ; and, when the last grandchild should arrive at full age, such an arrangement should take place, as would place all his grandchildren on an equal footing with regard to the estate, leaving his trustees and executors to adopt the most eligible plan for the purpose : held, that the legacies given to the grandchildren were vested in present interest, though postponed as to enjoyment. *Corbin v. Wilson*, 2 Ashmead, 178.

2. (*Same.*) Legacies are always to be considered as vested, unless the intention of the testator is manifestly otherwise ; and courts will not conjecture in favor of an intention against this general rule. *Ib.*
3. (*Maintenance of legatee.*) Where a legacy is given by a parent to a child, an infant, whether the legacy be vested or contingent, interest is given for maintenance ; on the principle of the natural obligation of parents to provide for the present, as well as the future maintenance of their children. *Ib.*
4. (*Same.*) Where a legacy has been given by a party who puts himself in *loco parentis*, the intent to do which is apparent from the face of the whole will in which the legacy is given, the same doctrine holds as in the case of a legacy to a child by a parent. *Ib.*
5. (*Same.*) Where a legacy has been given to an infant absolutely, payable at full age, with no devise over, and no third person is in any way interested in *presenti* or in *futuro* in the fund, a court of equity will compel a trustee, holding such a fund, to appropriate or pay the interest, where the legacy carries interest, or even the principal, where it does not, for the support, education, and advancement of the infant. *Ib.*
6. (*Vested or contingent.*) A legacy shall be deemed vested or contingent, just as the time shall appear to have been annexed to the gift or the payment of it. And where there is no separate and antecedent gift, which is independent of the direction and



time for payment, the legacy is contingent. *Moore v. Smith*, 9 Watts, 403.

See BEQUEST.

**LIMITATIONS.** (*Conditional promise.*) A conditional promise to pay a specified demand, where the other party refuses to accede to the condition annexed, is not sufficient to take the demand out of the operation of the statute of limitations, either as a promise to pay or as an admission of present indebtedness. *McLellan v. Albee*, 5 Shepley, 184.

2. (*Same.*) Where the principal in a note, on being requested to pay it, said, "he could not pay it then," and on being told that the surety would be called upon for the note, replied, "that he did not want to have the surety called upon for it, as the surety had signed the note to oblige him;" and where in another conversation with the agent of the payee, the principal "proposed to pay a part of it, if he could have time on the balance," and the agent replied, that he "was not authorized to take a part of it;" it was held by the court, that the demand was not taken out of the operation of the statute of limitations. *Ib.*

3. (*Specialty.*) Although the presumption of payment of a specialty does not arise in less than twenty years, yet circumstances may be shown to have occurred, which, taken in connection with the time that has elapsed, will be sufficient to justify a verdict for the defendant. *Tilghman v. Fisher*, 9 Watts, 441.

**MERGER.** (*Action of covenant.*) In an action of covenant upon an agreement for the purchase and sale of land, in which it appeared that the vendor had executed and delivered a deed of conveyance, and a receipt for the purchase money, in pursuance of his covenant, it was held, that he was not thereby precluded from a recovery, upon proof that the vendee had not complied with the covenant on his part, by payment of the consideration. *Byers v. Mullen*, 9 Watts, 266.

See ANNUITY.

**MILLS.** (*Flowage — Damages for.*) Where the proprietor of land, overflowed by a dam owned by different persons, proceeded by separate complaints, and recovered a judgment for

yearly damages against each owner of the dam for flowing different portions of the complainant's land, and where afterwards one of the respondents becomes sole owner of the dam; if the proprietor of the land seek an increase of his yearly damages, he may combine the whole subject matter in one complaint against the then owner of the whole dam. *Jones v. Pierce*, 4 Shepley, 411.

**MORTGAGE.** (*Undivided portion.*) The mortgagor of an undivided portion of a tract of land cannot without the consent of the mortgagee, by an after conveyance by metes and bounds of any part of the mortgaged premises, withdraw from the lien created by the mortgage the part so conveyed. *Webber v. Mallett*, 4 Shepley, 88.

2. (*Outstanding — or extinguished.*) Where one pays to the holder of a mortgage the amount due thereon, and takes a deed of quitclaim, if the intention to extinguish the mortgage appear at the time, it is decisive of the question; but if no such intention appear, equity presumes the mortgage to be outstanding, or extinguished, as the interest of the party paying may require. *Hatch v. Kimball*, 4 Shepley, 146.

3. (*Merger.*) A merger is prevented, and the mortgage upheld, where there is a strong equity in favor of it, but never where it is not for an innocent purpose. *Id.*

4. (*Cancelled.*) Where a mortgage has been cancelled and discharged, and a new security on the same land has been taken for the debt, the mortgage is to be considered as if it had never existed, and intervening incumbrances or attachments are let in. *Stearns v. Godfrey*, 4 Shepley, 158.

5. (*Discharge.*) Nothing but payment in fact of the debt, or the release of the mortgagee, will discharge a mortgage. *Crosby v. Chase*, 5 Shepley, 369.

6. (*Recitals.*) One party is not estopped by the recitals in a deed taken by him from giving the truth in evidence to sustain it, if the other party goes behind the deed to defeat it. *Id.*

7. Thus, where the mortgagee received from the mortgagor a deed of the same premises, wherein it was said, that the deed

was made to cancel the mortgage, and the land was taken by an attachment made before the deed and consummated by a levy afterwards, it was held, that the mortgage, which with the notes had remained in the possession of the mortgagee by parol agreement made at the time with the mortgagor to await the attachment, was not discharged by taking the deed. *Ib.*

**NEGLIGENCE.** (*Canal boat.*) In an action by the owner of a canal boat against the steersman, whom he had employed to take her down the river, to recover damages for the loss of the boat, which was carried over a dam, in consequence of the negligence of the defendant, it was held that it was not a sufficient answer to the charge of negligence that the boat was not properly provided with poles and hands; if the vessel was improperly navigated too near the dam. *Hice v. Kugler*, 6 Wharton, 336.

**OFFICER.** (*Fees for levying execution.*) If an execution is delivered to an officer, with instructions to call upon the debtor, and to return the execution to be discharged upon securing one sixth part thereof, the officer is entitled only to fees for his travel and on the amount secured. *Pierce v. Delesdernier*, 5 Shepley, 431.

2. (*Travel.*) On collecting an execution an officer is entitled to his travel, computing the distance by the road usually travelled, whether he in fact travels a more or a less distant way to suit his own convenience. *Ib.*

**PARTITION.** (*Between tenants by metes and bounds and in common.*) Where an undivided portion of a tract of land was conveyed, and the grantor afterwards conveyed to others particular parts by metes and bounds, and the grantee of the undivided portion then petitions for partition, his share of the land should be so set off and assigned as not to embrace any part of the land thus conveyed by metes and bounds, if he can otherwise have a fair and equal partition. *Webber v. Mallett*, 4 Shepley, 88.

**PARTNERSHIP.** (*General reputation.*) General reputation is not admissible in evidence, in aid of other testimony, to prove a partnership. *Scott v. Blood*, 4 Shepley, 192.

2. (*Evidence of by judgment.*) Where notes purporting to be signed by the defendants as partners have been put in suit, and judgment rendered by default, a copy of that judgment is competent evidence in a suit against them in favor of a different plaintiff, to show that they had held themselves out as partners. *Fogg v. Greene*, 4 Shepley, 282.
3. (*Profit and loss.*) If four persons, by an agreement in writing, enter into an association for the manufacture of paper, providing for the purchase of stock and the sale of paper indefinitely, they are partners in the business; although there is no express stipulation to share profit and loss, as that is an incident to the prosecution of their joint business. *Barrett v. Swann*, 5 Shepley, 180.
4. (*Note by individual.*) If a note be given by an individual partner in the name of the partnership, although it be limited to a particular branch of business, it is *prima facie* evidence that the note was given on the partnership account. *Ib.*
5. (*Evidence of.*) Although the record of a judgment, in virtue of its rendition, is not admissible evidence to prove a partnership, unless the parties are the same in both suits; yet the record of a judgment, rendered by default against certain persons alleged to be copartners, is competent evidence, in a suit where the parties are different, to prove the fact that those persons did hold themselves out to the world as partners. *Ellis v. Jameson*, 5 Shepley, 235.

POSSESSION. (*Lines.*) The occupation of town lots up to a line-fence between them, for more than twenty-one years, gives to each party an incontestable right, and this whether either party knew of the adverse claim of the other or not; and whether either party has more or less ground than was in the lot he owns, originally. The right is settled after a possession of twenty-one years, without regard to where the original line once was. *Brown v. M<sup>c</sup>Kinney*, 9 Watts, 565.

POWER. (*To take care of land.*) A power to take care of land, carries with it a power to pay the taxes assessed upon it or to redeem it if sold by the treasurer as unseated, for the payment

of the taxes ; and in such case, the death of the owner is not such a revocation of the power, as will make void a redemption of the land by such agent, after a sale of it, as unseated. *Patterson v. Brindle*, 9 Watts, 98.

2. (*Of feme covert.*) A *feme covert* is deemed, in respect to her separate estate, a *feme sole* only to the extent of the power clearly given by the instrument by which the estate is settled, and has no right of disposition beyond it. *Wallace v. Costin*, 9 Watts, 187.

3. (*Execution of.*) A power of a private nature must be executed by all to whom it is given : but a power of a public nature may be executed by a majority. The criterion seems to be, not so much the character of the power or of the act to be done by virtue of it, as the character of the agent appointed for the performance of it. *Hall v. Canal Commissioners*, 9 Watts, 466.

4. (*Same.*) An authority committed to several as individuals, is presumed to have been given to them for their personal qualifications, and with a view to an execution of it by them all. *Id.*

**PRINCIPAL AND SURETY.** (*Contribution.*) Where judgment has been recovered against an insolvent principal and his two sureties, and has been paid by one of them, he may recover of his co-surety one half of the costs as well as of the debt. *Davis v. Emerson*, 5 Shepley, 64.

**RECEIVER.** (*Appointment of, in case of partnership.*) Where it appeared that a copartnership was insolvent, and that the complainants, who were copartners, were excluded from their full share in the management of the concern ; and the defendant, who was the acting partner, neglected to keep proper books of account, which he was required to do by the articles of copartnership, as well as to keep them free and open at all times to the inspection of the complainants, who were refused access to them ; the court, on motion, appointed a receiver before answer and final decree ; and on a final hearing, decreed a dissolution of the partnership. *Gowan, and others, v. Jeffries*, 2 Ashmead, 296.

2. (*Same.*) Where application is made for the appointment of a

receiver, on a bill filed for a dissolution of a subsisting partnership, before answer and final decree, it will only be granted under circumstances which would authorize a decree for a dissolution; and, where it is apparent that a dissolution will be decreed, on the ground of some breach of duty or contract, a receiver will be appointed. *Ib.*

3. (*Same.*) The principle upon which a receiver is appointed by a court of equity, in the case of a dissolution of a copartnership, and a disagreement between the partners as to the present disposition of the joint estate, is, that each partner has an equal right to the possession and control of the partnership effects and business, and the exclusion of a partner from his full share of management is the strongest ground for appointing a receiver. *Ib.*

4. (*Same.*) As a general rule, a receiver will not be appointed without notice to the parties interested; but to this principle there are exceptions, as where irreparable injury would be sustained by the delay; but the defendant, after the appointment, can apply to the court for relief against the order, which will be superseded on satisfactory cause being shown. *Ib.*

5. (*Same.*) The practice of the English chancery, to refer the appointment of a receiver to a master, will not be adopted by the court; but suitable persons may be nominated by the parties, and the court will act directly upon the nominations. *Ib.*

RECORD. (*Papers in court.*) Papers presented to a common law court, and acted upon only as matter of evidence, are no part of the record. *Kirby v. Wood*, 4 Shepley, 81.

2. (*Same.*) Where the action was a writ of entry, wherein the demandant declared merely that he was seized of the demanded premises in fee and in mortgage, a mortgage deed and note found filed with the papers in the case, but not particularly referred to in the declaration, are not a part of the record. *Ib.*

RECITAL. (*Of fact.*) Recitals of fact in a conveyance are not to be taken as a conclusive assertion by the grantor; on the contrary, being generally the work of a scrivener, they are entitled to but little respect by a jury. *Mehaffy v. Debbz*, 9 Watts, 363.

2. (*False.*) In an action by a vendor against a vendee, to recover the consideration of the purchase of land, in which the defendant sets up a defective title and loss of part of the land as a defence, a false recital in the deed is not evidence of actual fraud, without which the stipulated price is the standard value of the compensation. *Good v. Good*, 9 Watts, 567.

REFERENCE. (*Judgment in — effect of.*) If a deed be placed in the hands of referees, in a reference entered into by rule of court, to be delivered to the grantee, in pursuance of an agreement of the parties annexed to the rule, on his giving to the grantor his note for the amount found due by the referees, and if the note be given and received, and the deed be delivered, and the award be contested, but accepted by the court; all preliminary arrangements by the parties must be understood to be irrevocable while the judgment remains in force, and are not to be examined over again in an action for the land thus conveyed, even if mistake or fraud in the referees can be shown. *Tyler v. Carleton*, 4 Shepley, 380.

REPAIRS. (*Pay for — make.*) A covenant by a lessor, that he will pay all repairs exceeding a certain sum, cannot be so construed as to oblige him to make the repairs. *Lomis v. Ruetter*, 9 Watts, 516.

STATEMENT. (*In lieu of declaration.*) Nothing is indispensable to a statement which is not made so by the statute which has substituted it for a declaration; the cause of action must be set forth intelligibly, so as to exhibit an available cause of action, but performance of conditions precedent and every thing beyond the defendant's engagement to pay may be omitted. *Snevely v. Jones*, 9 Watts, 433.

STATUTES. (*Revival.*) The expiration of a statute, by its own limitation, *ipso facto* revives a statute which had been repealed and supplied by it. *Collins v. Smith*, 6 Wharton, 294.

SEIZIN AND DISSEIZIN. (*Election.*) If one who has the title and right of entry into lands, make an actual entry upon the tenant in possession, who resists the entry, and persists in the occupation; this is a disseizing at the election of the owner,

upon which a writ of entry may be maintained, although the tenant may show on the trial that he held by lease under one without title. *Dow v. Plummer*, 5 Shepley, 14.

2. (*Declarations.*) Although the declarations of one in possession of land that he held in subordination to the legal title, made after a conveyance of all his claim thereto, cannot affect the rights of the grantee, yet they do defeat any claim of title acquired by the grantor himself, prior to the conveyance, by disseizin. *Hamilton v. Paine*, 5 Shepley, 219.

**SHIPPING.** (*Liability of owners.*) Where a vessel is let to be employed for the season in fishing, to one who is to be master, and is to victual and man her, and is to pay to the owners for her hire a certain proportion of her earnings, and is to take his outfits and supplies of them; the owners are not liable during the time for any outfits furnished by others at the request of the master. *Houston v. Darling*, 4 Shepley, 413.

**SLANDER.** (*Proving malice.*) In an action of slander, evidence of words of a similar import of those charged in the declaration, spoken by the defendant afterwards, before and after the commencement of the action, is admissible for the purpose of proving malice. *Smith v. Wyman*, 4 Shepley, 13.

2. (*Proof of charge.*) In an action of slander, the defendant cannot give evidence of any other crime than the one charged, either in bar of the action, or in mitigation of damages. *Ridley v. Perry*, 4 Shepley, 21.

**SUBSTITUTION.** (*Sureties.*) One of three joint sureties, who paid the debt to their common creditor, may be subrogated to the rights of that creditor in the judgment paid by him, to enable him to recover contribution from the other two. *Croft v. Moore*, 9 Watts, 451.

**SURETY.** (*Discharge of.*) A surety is entitled to have his contract executed according to its terms; and if the creditor before the day of payment make a new contract without the consent of the surety, whereby he gives time, and disables himself from compelling payment at the day by a suit at law, or places himself in such position that the debtor can in equity



obtain an injunction against his proceeding, the surety is discharged. *Leavitt v. Savage*, 4 Shepley, 72.

2. (*Same.*) If the contract be by an instrument under seal, the surety may be discharged by an extension of the time of payment, or of performance, by a writing without seal. *Ib.*

3. (*Same.*) Yet if the contract extending the time be without consideration, it is not binding upon the creditor, and the surety will not thereby be discharged from his liability. *Ib.*

4. (*Same.*) But the mere delay of the party to enforce payment at the time or in the manner provided in the contract does not release a surety; nor will the liability of the surety be discharged by the neglect of the creditor to enforce payment by a suit against the principal on the request of the surety. *Ib.*

**TENANTS IN COMMON.** (*Ouster.*) As between tenants in common, a legal presumption of ouster arises in favor of one who has been in the peaceable and exclusive perception of the profits of the land for more than twenty-one years. *McChaffy v. Dobbs*, 9 Watts, 363.

**TRUSTEES.** (*Liability of.*) Where one of two joint trustees, who had received the fund of a residuary estate bequeathed to a minor, became embarrassed in his business, and placed in the hands of his co-trustee securities "as a deposit for moneys belonging to the residuary estate" used by him, for which his co-trustee gave him a receipt; and afterwards the friends of the residuary legatee becoming alarmed applied to the co-trustee, who said he held notes sufficient to cover the whole of the estate, "and that they might make themselves perfectly easy on that score;" which induced them to pay no further attention to the subject; and subsequently the co-trustee, who had received the securities, returned them to his colleague, who realized the amount of them, and the debt was lost to the estate in consequence of his bankruptcy: held, that the trustee was chargeable in account with the amount of the deposited securities surrendered by him, together with interest upon the amount thereof, first deducting therefrom a commission of five per cent. *Evans's estate*, 2 Ashmead, 470.

2. (*Same.*) Where the trustee appropriated the amount of the securities returned to him by his co-trustee, together with other moneys received by him, belonging to the trust fund, to the purchase of lands in the state of Ohio, it is no objection to the liability of the co-trustee, for the amount of the securities lost through his negligence, that the party injured made no attempt to enforce the specific lien which might have existed against the land purchased by the bankrupt trustee. *Ib.*
3. (*Same.*) Where it can be clearly proved, that a trustee has used his trust funds in the purchase of lands in his own name and for his own use, chancery will raise the money out of the land, by a sale of the whole, or such part of it as may be necessary to produce the sum drawn from the trust fund. *Ib.*
4. (*Resulting trusts*) arise where purchases are made with the funds of another, in the name of the purchaser, for the use of the owner of the money; and equitable liens arise in cases where it can be clearly shown that a trustee has used the trust funds in the purchase of real estate for his own use. *Ib.*
5. (*Same.*) A resulting trust, if it arise at all, must arise at the time of the conveyance, and is a pure, unmixed trust of the ownership and title to the land itself; and is not an interest in the proceeds of the land, nor a lien upon it as security for an advance or other demand, nor an equity or right to a sum of money to be raised out of the land, or upon the security of it. *Ib.*
6. (*Purchase from.*) The maxim *caveat emptor* is inapplicable to a purchaser from a trustee, but he may set up a want of consideration, or any defect of title, as a defence to an action for the purchase-money, which he might set up to an action on a contract of sale by the beneficial owner; hence, in an action by an assignee in trust for the benefit of creditors, to recover the price of a tract of land held by the insolvent assignor under articles of agreement only, the defendant is entitled to defalcate in proportion to the purchase-money due by the assignor on the articles. *Adams v. Humes*, 9 Watts, 305.

**TRUST.** (*Payment of purchase money.*) Where one contracts

for the conveyance of land to him on his paying certain sums at specified times, a resulting trust is not created by his paying a part of the purchase money. *Conner v. Lewis*, 4 Shepley, 268.

**USURY.** (*Sale of note.*) The sale of a negotiable note, free from usury when made, at a greater discount than legal interest, is not conclusive evidence of usury, although the party making the sale is unconditionally liable by his endorsement. *Farmer v. Sewall*, 4 Shepley, 456.

**VENDORS AND PURCHASERS.** (*Vesting of property.*) Where an election is given to the party receiving a chattel to return it, or to pay a sum of money, by a given day, the property in the chattel immediately vests in him. *Buswell v. Bicknell*, 5 Shepley, 344.

2. (*Same.*) Where the owner of a cow delivered her to another, on his promise to pay a certain sum of money therefor by a given day, or to return the cow and pay a lesser sum for the use thereof, the property in the cow immediately passed from the former to the latter. *Ib.*

**WAGER.** (*Not recoverable.*) An action cannot be maintained in Pennsylvania to recover a sum of money alleged to have been lost by the defendant to the plaintiff upon a wager or bet. *Edgell v. McLaughlin*, 6 Wharton, 176.

**WARRANT.** (*Same name.*) A plaintiff could not maintain ejectment for a tract of uncultivated land merely because his name is the same as that used in the warrant; he must be identified by evidence of his having paid for the warrant, or procured the survey to be made, or paid the purchase-money: — and if it appear that another person paid the purchase-money and procured and paid for the survey, the name will not give title against the purchaser who bought and paid for the land, even if the plaintiff show that he wrote the application. *Wolf v. Goddard*, 9 Watts, 544.

**WARRANTY.** (*Unfounded affirmation.*) No implied warranty arises from an unfounded affirmation of soundness in the sale of a chattel; but for a deceitful representation of it, the remedy is by an action *ex delicto*. *McFarland v. Newman*, 9 Watts, 55.

2. (*Same.*) A naked affirmation is not itself an express warranty, nor evidence of it; and though it may, in connection with other circumstances, be competent to show that the vendor had agreed to be responsible for the truth of it, yet the effect of oral words in constituting an express warranty, is determinable not by the court but by the jury. *Ib.*

WITNESS. (*Wife.*) A wife cannot be a witness in a case where a joint charge is jointly tried against her husband and others; yet if they are separately tried, she is a competent witness for the other co-defendants; and to give them the benefit of her testimony, separate trials will be awarded them by the court, in all cases except that of a criminal conspiracy. *Commonwealth v. Manson, and another*, 2 Ashmead, 81.

2. (*Vendor of land.*) A vendor of land released from his covenants as to title is a competent witness for the vendee in an ejectment against a third person for part of the property sold. *Summers v. Wallace*, 9 Watts, 166.
3. (*Partner.*) In an action of debt upon a lease, a partner of the defendant in the business carried on with the demised premises, although not a party to the instrument, is incompetent as a witness. *Lomis v. Ruetter*, 9 Watts, 516.

## CRITICAL NOTICES.

1. — *The Louisiana Law Journal, devoted to the Theory and Practice of the Law.* Edited by GUSTAVUS SCHMIDT, Counsellor at Law. Vol. 1. No. 1. May, and No. 2. August, 1841. Published quarterly by E. Johns & Co., New Orleans, 1841.

IN our last number, we expressed a hope that this young law periodical might live to grow up; and the appearance of the second number, at its regular time of publication, gives some assurance, at least, that we shall not be disappointed. Before noticing the contents of these two numbers, we beg leave to suggest to our cotemporary, instead of the perpetual rubrick of the "Louisiana Law Journal," to place a running title referring to the subject treated of at the head of the page, by which one would be able to look at any particular article without turning over the whole work. The first number contains the editor's address to the public, a history of the jurisprudence of Louisiana, reviews of Savigny's treatise on Possession, and Story's Conflict of Laws,—reminiscences of the late chief justice Marshall,—celebrated criminal trials in France, Scotland, and Spain,—reform of the law in Russia,—decisions of the Supreme Court of Louisiana,—and the trial of William H. Williams. The second number contains the ordinances of O'Reilly,—speech of the attorney general in Williams's case,—articles on the necessity of a criminal court of appeals, and on the Batture question,—decisions of the supreme and commercial courts,—law notices,—and letters to the editor

from judge Story and chancellor Kent (which, we imagine, the learned writers could hardly have intended for publication.)

We are much pleased with the undertaking of this periodical, and congratulate our professional brethren, throughout the union, on the facilities which it will afford them for becoming acquainted with the peculiarities of the jurisprudence of a state, with which almost every state in the union has business relations of more or less importance. The work is ably conducted, though, in addition to the defect already noticed, we could point out others of a similar, and some of a graver character. We observe, for example, that both the numbers before us belong to the first volume, but they are not paged continuously, as they should be to form one volume, but independently; so that in referring to them hereafter, we must not only mention the volume and page but add also the number. These little things, though they do not belong to the "weightier matters of the law," are not without their importance. We wish our cotemporary all the success, which so laudable an undertaking deserves.

2.— *Reports of Cases at Law and in Equity, argued and determined in the Supreme Court of Alabama, during 1840.* By the Judges of the Court. Volume I. New Series. Tuscaloosa: 1841.

Hitherto the decisions of the supreme court of Alabama have been published by a state reporter, an office which seems to have been continued down to and including the year 1839, with which Mr. Porter closes his ninth volume. The cases for the year 1840, contained in the volume before us, appear as the first volume of a new series of Alabama Reports, reported by the judges of the Supreme Court. But why this change has been made, or by what means, neither Mr. Porter in his closing volume, nor the judges in the commencement of their new series, have seen fit to inform us. This is a sort of neglect, which we have had so frequent occasion to observe, that we are almost ready to lay it down as a general principle, that reporters and revisers of statutes

are wholly unable to write prefaces. In the present case, as on many former occasions, we should like to know the why and the wherefore of the change to which we have alluded.

Notwithstanding the substitution of the judges for our old friend Mr. Portet, we do not perceive any change for the worse, either in the character of the cases or the manner in which they are reported, to reference to both which particulars, we have, heretofore, and on more than one occasion, expressed our favorable opinion.

8. — *Opinions of the Attorneys General of the United States, from the commencement of the Government down to the first of March, 1841.* Public Documents of the 26th Congress, 2d Session. House of Representatives, No. 123.

In order to render this volume of opinions as valuable as it was probably expected to be, when the preparation of it was directed by congress, each of the opinions should have been accompanied, when necessary, by a short statement of the facts or case to which it refers; as it is, however, it is a most valuable and interesting collection of authorities on points, which, from their very nature, are not likely to arise in the courts, but which are nevertheless of great importance to the public. This volume may be regarded as the first contribution to that branch of our jurisprudence, which, in France, is designated by the term "administrative law."

4. — *The Law Magazine: or Quarterly Review of Jurisprudence.* No. LIV. November, 1841. London: Sanders & Benning.

This is an uncommonly interesting number of a journal, to which we have before and often acknowledged our obligations. It has arrested our attention, however, at the present time, as it contains a review of our translation of professor Mittermaier's article on the effect of drunkenness upon criminal responsibility, published in a late number of the Jurist and also as a pamphlet. Our translation, it seems, has been reprinted in the Law Series of the "Cabinet Library of Scarce and Celebrated Tracts," published

at Edinburgh, and, for aught that appears in the title, as given in the Law Magazine, without the slightest acknowledgment of the source from whence it was taken. The reviewer speaks of the work as "an ingenious essay on a curious question by a remarkable man," but, as might be expected, he does not agree with the author in all his views.

5. — *Case of Bates and Himes against the Bank of the State of Alabama, in the Supreme Court of Alabama. June term, 1841.*

We have been very politely furnished with a carefully prepared report of this case, published in advance of the volume for the current year; and we regret that it is not in our power to give any thing more than an exceedingly brief notice of it.

By the charter of the bank of the state of Alabama, it was forbidden "to purchase or discount any draft or bill of exchange for a larger sum than five thousand dollars," and also "to deal in articles of goods, wares, or merchandise, in any manner whatever," unless to secure a debt due to the bank in its regular business transactions; and on these two prohibitions arose the principal questions in the case. The circumstances which gave rise to it are stated in the following extract from justice Ormond's opinion.

"In the early part of the year 1837, owing to the convulsions in commerce, and other causes, there was a general suspension of specie payments by the banks of the different states; and, by the sudden withdrawal of the accustomed supply, commerce languished, and great distress pervaded the entire community. As a necessary consequence of this state of things, confidence was lost, and the bank, though willing to pursue its accustomed course, could not do so without the risk of increasing the amount of indebtedness to the bank, which was already too great. In addition, by the act of the called session of 1837, the banks of the state were required to replenish their vaults with specie. During the existence of this state of things, the bank adopted and promulgated the 'rules and regulations' now under consideration. The preamble states, 'that the board of directors being desirous of placing the bank in a situation to resume specie payments as early as possible, and to maintain the character and value of its paper, and to accomplish those important and desirable objects, must be provided with a suitable proportion of specie



and exchange funds, will make advances on cotton under the following rules and regulations.'

"Here the object and purpose is distinctly stated, but however laudable the end might be, it will not justify the use of unlawful means. It is stated that the bank would 'make advances on cotton,' and this expression was laid hold of as showing the character of the transaction; but it is obvious that the bank could not, by affixing a particular name to it, alter its character. This instrument like all others must be considered altogether to arrive at its meaning, and it is expressly stated in the preamble, that the 'advance' will be made under 'the following rules and regulations;' to them therefore we must look to ascertain its true intent and meaning.

"The sum of these 'articles' is, that any person having cotton in possession might have it valued, and upon its delivery to the agent of the bank, receive an advance thereon, not to exceed twenty-five per cent. above the actual value; and should thereupon give his bill for the amount received, payable in nine months, with two good endorsers. The cotton so received by the bank was to be shipped by it, at the risk and expense of the owner, who had the right to limit the price and time for and at which the cotton should be sold; but this power ceased at the expiration of four months from the time of the arrival of the cotton in a foreign port. Upon its sale, the net proceeds were to be placed to the credit of the bill, with interest at six per cent. per annum; the excess, if any, to be paid by the bank to the shipper, who was also to be entitled to the benefit of all difference of exchange, when the cotton was sold in a foreign port, except one per cent. which the bank was allowed to retain. The bank to be accountable for no losses but those arising from the misconduct or mismanagement of their agents. In the event the proceeds of the cotton did not pay the bill, the bank agreed to take for the deficiency a good bill on New York, not having longer to run than the fifteenth of February thereafter, if offered twenty days before the first bill fell due."

In pursuance of an arrangement with the bank, of the kind above described, Bates and Himes delivered to its agent in Mobile one thousand and twenty-two bales of cotton, and, on the credit of it, obtained an advance of seventy-nine thousand six hundred and thirty-two dollars and seventy-five cents, for which they drew sixteen bills of exchange of five thousand dollars each. The simple statement of the whole transaction seems to be, that the bank dis-

counted sixteen bills of exchange, each for the sum of five thousand dollars, of the same date and having the same time to run, with the collateral security of a shipment of cotton. An action having been brought by the bank and judgment recovered therein on one of these bills, against Bates and Himes, the drawees, the case was then removed by the defendants to the supreme court by a writ of error. Two questions were made, namely: 1, whether the prohibition to purchase bills of exchange for a larger sum than five thousand dollars was infringed by the negotiating of the sixteen bills in this case amounting in the whole to eighty thousand dollars; and, 2, whether the delivery of the cotton to the bank for the purpose above stated was a dealing therein contrary to the provision of the charter. These questions were, of course, raised by the defendants, as a defence to the action; but a further question was made by the court, namely, whether, supposing the bank to have infringed its charter, in these particulars, the defendants could take advantage of it as a defence. The supreme court decided the first question in the affirmative, and the second in the negative, (justice Goldthwaite dissenting), but they also held, that both the charter provisions were directory merely, and could not be taken advantage of by a party to a transaction infringing them. We should be glad to present these able opinions to our readers, at length, if our limits would permit; but, as it is, we can do no more than express our entire concurrence in the judgment of the court.

6. — *A Digest of the Penal Law of the State of Louisiana, analytically arranged.* By M. M. ROBINSON, Attorney at Law. New Orleans: Published for the author, 1841.

The criminal code of Louisiana will always have a peculiar interest, both for those who are concerned in the reform of the law, and for the legal profession, in general, from the circumstance of its having been the occasion of the preparation of Mr. Livingston's celebrated work, the fame of which has gone abroad into all lands. Many persons, indeed, suppose that his system of criminal law was adopted by the state, and is now the law of Louisiana; but

this is a great mistake. At the time Mr. Livingston made his report, the state was in no condition to put his system into operation, even if it had met with universal favor (which it was far from receiving); inasmuch as it was wholly predicated upon and calculated for penitentiary punishments, which the state had then no appropriate means of inflicting. The penal code of Louisiana did not, therefore, gain any thing, as the direct result of Mr. Livingston's labors; which, in fact, seem to be appreciated every where else better than in Louisiana. Nor does it seem to have derived any indirect advantage from these labors, in the way of suggestions for future legislative provisions. From the statement of Mr. Robinson, in his preface, the criminal law of Louisiana appears to have grown up in the same manner, and to be now in a similar condition, with that of the other states of the union.

"The want of some convenient arrangement of the penal laws of the state, has been generally felt. No revision of the laws having ever been made, it has become not a little difficult to ascertain, among the mass of statutes that have accumulated since the organization of the territorial government, what portion still retains the force of law. The embarrassment resulting from this state of things, seems not to have been confined to those engaged in the administration of the law. The recurrence, in different acts, of provisions often identical, and the occasional enactment of special statutes for cases already embraced in some general provision of the law, prove, that even those intrusted with the business of legislation, have not always been aware of the existence of laws to be found in the statute book, and still in full force.

"The digest of the laws published under the authority of the legislature in the year 1828, was prepared without any attempt at a general revision. Nor was any effort made in that compilation, to separate the penal code from the mass of general and private acts, though the attention of the legislature appears to have been turned to the importance of such an arrangement as early as the year 1821, when an act was passed under which the late Mr. Livingston was employed to prepare a code of criminal law for the consideration of the general assembly. The *projet* reported by that eminent lawyer did not receive the sanction of the legislature."

Mr. Robinson has divided his work into two books, viz.: First, *Of the Nature and Punishment of Offences*, containing nine chap-

ters, 1, Of crimes and misdemeanors ; 2, Of accessories ; 3, Offences against the government ; 4, Offences against public justice ; 5, Offences against the public peace ; 6, Offences against public trade ; 7, Offences against the public police or economy ; 8, Offences against the persons of individuals ; and 9, Offences against the habitations and property of individuals ; and, Second, *Of the Means of preventing and punishing Offences*, also containing nine chapters, 1, Of the means of preventing offences ; 2, Courts of criminal jurisdiction and subordinate officers ; 3, Summary judgments ; 4, Arrest, commitment, and bail ; 5, Of the several modes of prosecution ; 6, Of arraignment ; 7, Trial and conviction ; 8, Judgment and its consequences ; and, 9, Reprieve, pardon, and execution. The index is very full and complete.

This digest, so far as we are able to judge of it, seems to be well and faithfully executed ; and cannot fail to be of great public utility in Louisiana.

7. — *Reports of Cases determined in the Supreme Judicial Court of the State of Maine.* By JOHN SHEPLEY, Counsellor at Law. Volume V. (Maine Reports, volume xvii). Hallowell : Glazier, Masters and Smith : 1841.

Less than a year ago, we had occasion to notice Mr. Shepley's fourth volume, and, at the same time, to allude to his loss of the office of reporter, by the fortune of (political) war. Since then, the fortune of war has changed, and Mr. Shepley's political friends being now in power, in Maine, we suppose we may consider him as good as restored to office. But, in the meantime, his successor must have got some materials for a volume, though probably not many decisions, and what is to become of them ? Is each reporter to conclude the cases begun by him ? or is he to turn over the unfinished ones to his successor ? or are they to become joint reporters, for a certain period ?

What nonsense it is, to make the office of reporter a political one, dependent upon the ballots cast for a wholly different object. We sincerely hope that when the whigs next come into power, in Maine, they will set a good example and continue the reporter in

office, if he is a good officer, although he may happen to belong to the party of their political opponents. This is the only way by which they can destroy the strength of the bad precedent, established by the other party, in the removal of Mr. Greenleaf. This never-ending change in the office of reporter, (no less than five persons have held the office in twenty years), is about as sensible and judicious, as would be the employment, in succession, of as many different tailors, to work upon the same garment, or of as many different architects, upon the same edifice. We have no doubt, that, to this cause, in part, must be ascribed the falling off of the Maine cases, in value and importance, and the greatly diminished interest, with which they are received by the profession, in other states.

*S. — Commentaries on the Law of Partnership, as a Branch of Commercial and Maritime Jurisprudence, with occasional Illustrations from the Civil and Foreign Law. By JOSEPH STORY, LL.D. Boston : C. C. Little & J. Brown.*

Though we have not had an opportunity to peruse this new work from the prolific brain and rapid pen of the most indefatigable and successful writer of law books, now living, we have no hesitation in saying, that it will fully sustain the already established reputation of its author, and be of very great utility not merely to lawyers and judges, but to all who are engaged in commercial pursuits.

Chancellor Kent, in a letter to the editor of the Louisiana Law Journal, dated July 31, 1841 (on which day the venerable writer attained the age of seventy-eight) bears the following testimony to the merits of Mr. Justice Story and his works :

"I think all the treatises of my friend Story are, upon the whole, the most finished and perfect of their kind, to be met with in any language, foreign or domestic, and, for learning, industry, and talent, he is the most extraordinary jurist of the age."

However we might differ, in some particulars, from the first part of this judgment, we heartily concur in the second. In our opinion, and to the honor of our country be it spoken, Mr. Justice Story, "for learning, industry, and talent, is the most extraordinary jurist of the age."

## QUARTERLY LIST OF NEW PUBLICATIONS.

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### ENGLAND.

A Treatise on the Law of Executors and Administrators. By *Edmund Vaughan Williams*. Third edition. 2 Volumes.

The Law relating to duties on Probates and Letters of Administration in England, and Inventories of Personal or Movable Estates in Scotland, and on Legacies and Successions to Personal or Movable Estates in Great Britain. By *Thomas Gwynne*. Third edition.

Of Societies called Clubs. A Law Pamphlet. By *Charles Wordsworth*.

The Law of Pawns or Pledges, and the Rights and Liabilities of Pawnbrokers, &c. By *James Paul Cobbett*.

Martin's Practice of Conveyancing; Precedents with practical notes. By *Charles Davidson*. Fifth volume. Part I.

A Treatise on the Practice of the High Court of Chancery, &c. By *Edmund Robert Daniell*. Volume III. Part I.

Trials of Patrick Maxwell Stewart Wallace and Michael Shaw Stewart Wallace, for wilfully destroying the brig Dryad, off Cuba, with intent to defraud the Marine Insurance Companies and underwriters.

A Treatise on the Law and Practice of Injunctions. By *Charles Stewart Drewry*.

The New Orders for the Regulation of the Practice and Proceedings of the Court of Chancery, with remarks, &c. By *John Sydney Smith*.

All the New Orders of the High Court of Chancery, from Hilary Term, 1828, to Michaelmas Term, 1841. By *Samuel Miller*.

A Practical Treatise on the Law of Municipal Corporations, adapted to the recent reforms, &c., with the Statutes and reported cases to Trinity Term, 1841. By *W. Glover*, Sergeant at Law.

The Laws of Landlord and Tenant

Practical Observations on the New Orders for the regulation, &c., of the Court of Chancery. By *Edmund Robert Daniell*.

Selwyn's Abridgment of the Law of Nisi Prius. Tenth edition.

The Case of the Antenatus in Scotland, claiming as Heir in England, &c. By *D. C. Maylan*.

Collyer's Law of Partnership. Second edition.

#### UNITED STATES.

Commentaries on the Law of Partnership, as a branch of Commercial and Maritime Jurisprudence, with occasional illustrations from the Civil and Foreign Law. By *Joseph Story*, LL. D. Boston: C. C. Little & J. Brown.

A Practical Treatise on the Law of Contracts not under seal, and upon the usual defences to actions thereon. By *Joseph Chitty*, Jr. Esq., fifth American, from the third London edition, corrected, re-arranged and enlarged, by *Thompson Chitty*, Esq., with notes of American decisions on the Law of Contracts to the present time. By *J. C. Perkins*, Esq. Springfield: G. & C. Merriam, and Little & Brown, Boston.

Reports of Cases determined in the Supreme Judicial Court of Maine. By *John Shepley*. Vol. V. (Maine Reports Vol. XVII.) Hallowell: Glazier, Masters & Smith.

Reports of Cases argued and determined in the English Courts of Common Law, with Tables of the cases and principal Matters. Edited by Hon. *Thomas Sargent*, of the Supreme Court of Pennsylvania, and Hon. *Thomas McKean Pettit*, President of District Court for the City and County of Philadelphia. Vol. XXXVIII. Philadelphia: T. & J. W. Johnson.

Reports of Cases argued and determined in the Supreme Court of Judicature and in the Court for the Correction of Errors of the State of New York. By *John L. Wendell*. Vol. XXIV. Albany: W. & A. Gould, & Co.

Reports of Cases adjudged in the Courts of Common Pleas, Quarter Sessions, Oyer and Terminer, and Orphans Court of the first Judicial District of Pennsylvania, with notes and references. By *John W. Ashmead*. Vol. II. Philadelphia: T. & J. W. Johnson.

[We have inserted in our digest some of the most important decisions contained in this volume]

The trial of Alexander McLeod for the murder of Amos Durfee at the burning and destruction of the Steamboat *Caroline* by the Canadians, Dec. 29th, 1837. Reported by *Marcus T. C. Gould*, assisted by *H. Fowler*. New York: Gould Banks & Co.

Reports of Cases argued and determined in the Supreme Judicial Court of Massachusetts. By *Theron Metcalf*. Vol. II. Part I.

Points in the Law of Discovery. By *James Wigram*, Esq. one of her Majesty's Counsel. First American from the second London edition, with notes and references to American Cases, by a member of the Boston Bar. Boston: Charles C. Little & James Brown.

Reports of Cases argued and determined in the Supreme Court of the State of Illinois. By *J. Young Scammon*, counsellor at law. Volumes I. & II. Philadelphia: Kay & Brother. Boston: Little & Brown. Chicago: Gale & Burley.

IN PRESS.

*By Charles C. Little & James Brown.*

Reports of Cases argued and determined in the Supreme Judicial Court of Massachusetts. By *Octavius Pickering*, Counsellor at Law. Vol. XXIII.

Commentaries on the Law of Evidence. By *Simon Greenleaf*, LL. D. Royall Professor of Law in Harvard University, 1 volume, 8vo.

*By T. & J. W. Johnson.*

Starkie on Evidence, from a new London Edition, greatly enlarged by the author, with the American notes from the last edition and new notes and references.

Harrison's Digest, volume 4, bringing the decisions of the English Courts down to the year 1840.

English Common Law Reports, volume 38, containing cases for 1841. In this volume, the publication of the English Bankruptcy Cases, which the publishers intend hereafter to include in their series, will be commenced. They will also be sold separately.

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#### TO OUR READERS.

In consequence of the number and size of the articles in the first part of the present number, and the necessity of furnishing our readers with the usual amount of new cases, we have been obliged to omit entirely some of the other departments of our journal. We hope, however, that the value of what we have given will compensate for its want of variety.



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